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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED
IN THE
SUPREME COURT OF ARKANSAS

TIGER v. ROGERS COTTON CLEANER & GIN COMPANY.

Opinion delivered July 11, 1910.

1. CORPORATION—RELEASE OF STOCK SUBSCRIPTION—VALIDITY.—An insolvent corporation cannot purchase shares of its own capital stock to satisfy the unpaid subscriptions thereon, and thereby release the subscribers from liability to creditors of the corporation. (Page 4.)
2. SAME—POWERS OF PRESIDENT.—The president of a corporation is not authorized to purchase shares of stock in such corporation to satisfy the unpaid subscriptions thereon in the absence of authority from the board of directors; and hence the delinquent stockholders were liable for their unpaid subscriptions in garnishment proceedings collateral to an action against the corporation. (Page 5.)
3. GARNISHMENT—SEPARATE ACTION UNNECESSARY.—Since the passage of the act of April 8, 1889, in reference to judicial garnishments, and the amendatory act of April 1905, it is no longer necessary to commence a separate action against the garnishee in order to authorize judgment against him, but in cases covered by these acts final judgments may be rendered against the garnishee upon default made by him, or when on a trial he is found to be indebted to the judgment-debtor. (Page 6.)
4. LIMITATION OF ACTIONS—NECESSITY OF PLEA.—The statute of limitations cannot be relied upon in the Supreme Court if it was not pleaded in the lower court. (Page 7.)

Appeal from Mississippi Circuit Court, Osceola District;
Frank Smith, Judge; affirmed.

STATEMENT BY THE COURT.

The appellee on the 14th day of May, 1908, obtained judgment against the Luxora Gin & Manufacturing Company in the sum of \$476.60. Execution was issued upon the judgment against

the judgment-debtor, and a return of *nulla bona* was made thereon. On the 21st day of November, 1908, a writ of garnishment was issued against appellants and others, summoning them as follows:

"To answer what goods, property, chattels and effects they, or either of them, had in their possession at the time this writ was served upon them, or that may have come into their possession since the service of this writ, belonging to the said Luxora Gin & Manufacturing Company. And they will further answer what sum or sums of money they or either of them owe the defendant, Luxora Gin & Manufacturing Company."

Appellants answered "that said firm of Tiger Brothers had no goods, property, chattels or effects in its possession, either at the time of the service of this writ or any other time within the past three years, belonging to the Luxora Gin & Manufacturing Company, and further states that it does not owe the said Luxora Gin & Manufacturing Company any sum whatever."

This answer was filed December 2, 1908.

After hearing the evidence, the court found the facts as follows:

"First, that the Luxora Gin & Manufacturing Company is a corporation.

"Second. That the garnishees, E. Tiger and N. Tiger, subscribed and agreed to pay par value for \$500 worth of the capital stock of said corporation.

"Third. That said E. Tiger and N. Tiger did pay the sum of \$100 on their subscription to the capital stock of said corporation, leaving a balance due of \$400 on said capital stock, with interest thereon at the rate of 6 per cent. per annum, and amounting to the sum of \$120 at this date, making a total, principal and interest, due from them to the said Luxora Gin & Manufacturing Company of \$520.

"Fourth. That on the 1st day of July, 1905, said Luxora Gin & Manufacturing Company offered for sale the other \$400 worth of stock owned by the said E. Tiger and N. Tiger to satisfy the balance of the unpaid subscription for the same, and, there being no other bidders, John B. Driver, the then president of said corporation, bid for said corporation the amount of said unpaid subscription, and reported the same to the board of directors.

"Fifth. That when the purchase of said stock by said John B. Driver for the said Luxora Gin & Manufacturing Company was reported to said board of directors, the said board of directors expressly repudiated said transaction and refused to ratify the same.

"Sixth. That on the 14th day of May, 1908, a judgment was rendered herein in favor of the Rogers Cotton Cleaner & Gin Company, and against the Luxora Gin & Manufacturing Company, on a promissory note for the sum of \$474.60, upon which there is due a credit for the sum of \$100, the amount realized from a sale of the property mentioned in said judgment.

"Seventh. The court further finds that at the time the stock of said E. Tiger and N. Tiger in said Luxora Gin & Manufacturing Company was sold, or attempted to be sold, to satisfy the unpaid subscription thereon, said corporation was hopelessly insolvent, and continued so down to the present time.

"Eighth. That at the time of the sale of said stock, or the attempt to sell said stock, the plaintiff was a creditor of said corporation, evidenced by the obligation upon which the judgment of May 14, 1908, was based."

Upon these findings of fact the court declared the law to be that an insolvent corporation has no right, as against its creditors, to purchase its own stock, and that the purchase or attempt to purchase the stock of appellant on behalf of the Luxora Gin & Manufacturing Company was null and void against the appellee, who was then and still is a creditor of the Luxora Gin & Manufacturing Company. The court entered judgment in favor of appellee against appellants, Tiger Brothers, for the sum of \$410 and costs.

From this judgment appellants duly prosecute this appeal.

W. J. Lamb, for appellant.

The corporation had the right to purchase its stock. Kirby's Dig. § 847. The suit should have been dismissed, because the insolvency of the debtor was not proved. 71 Ark. 1. No judgment can be rendered upon the answer of the garnishee. 45 Ark. 271; 52 Ark. 130; 48 Ark. 349; 42 Ark. 219.

J. T. Coston, for appellee.

The failure to file additional interrogatories was a mere error, which may be waived. 53 S. W. 44; 87 S. W. 50. Judg-

ment against the garnishee was proper. Kirby's Dig. § 3701; 70 Ark. 128. The statute of limitations was not raised below, and cannot be considered here. 95 S. W. 1005; 91 S. W. 555. The garnishee may plead the statute of limitations. Rood on Garnishment, § 376; 20 La. Ann. 116; 10 Mo. 557; 32 N. H. 141; 21 Tenn. (2 Hump.) 137; 11 Wash. 527. The five years statute applies. 62 Ark. 406. A question not raised in the motion for a new trial cannot be considered here. 23 Ark. 23; 70 Ark. 429. Insolvency of the corporation was proved. 51 N. E. 605; 72 N. W. 425. Appellants' abstract is not in compliance with rule nine. 122 S. W. 495.

WOOD, J., (after stating the facts). It could serve no useful purpose to discuss in detail the evidence upon which the court based its findings of fact. It suffices to say that these findings are sustained by the evidence.

Appellants contend that, at the time they filed their answer as garnishees herein, they were not, and had not been for more than three years, indebted in any sum whatever to the gin company. Appellants say this is so for the reason that their stock in the gin company was sold in July, 1905, and that thereafter appellants had no further interest in or connection with the gin company. But appellants' contention can not be sustained.

The court found, and the evidence tended to support that finding, "that at the time the stock of appellants in the gin company was sold or attempted to be sold to satisfy the unpaid subscription thereon said corporation was hopelessly insolvent." This being true, conceding for the present that there was a sale and purchase of the stock, the transaction was nevertheless void as to creditors of the corporation.

Mr. Cook, in his excellent work on Corporations, says: "If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside. The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, such purchase may be set aside, and the guilty corporate officers, as well as the vendor of stock, may be rendered liable thereon at the instance of a corporate creditor." Cook on Corporations, § 311, pp. 849-850, and cases cited in notes 3 and 1 of above pages. The corporation in which

appellants owned shares of capital stock for which they had not paid being insolvent, the sale and purchase by it of these shares of stock was but tantamount to a voluntary release by the corporation to appellants of the balance due by them for their shares of capital stock. But the corporation could not do this. It has no right to enter into any arrangement with the stockholder himself, or to engage in any transaction on its own motion, the effect of which would be to release from liability those who owed for capital stock in the corporation. The capital stock of a corporation is a trust fund that must be devoted to the payment of its debts. Neither the corporation nor the individual stockholder can divert it, directly or indirectly, from this purpose. *Carter v. Union Printing Co.*, 54 Ark. 580.

In the above case this court quoted from the Supreme Court of the United States as follows: "Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." *Sanger v. Upton*, 91 U. S. 60, 61.

There is therefore no merit in the contention of appellants that, when appellee sold its machinery to the gin company, it had no right to deal with the gin company in the belief that appellants' subscription to the capital stock of that company was an asset of the company at that time. The reverse is true, in view of the fact that the gin company was insolvent when the stock was sold and purchased by the gin company, conceding that it was.

But the purchase of the stock by the president of the company without any previous authority from the board of directors to do so, and without any subsequent ratification of his unauthorized act, as was the case here, rendered the transaction void. The stock never passed by that sale out of appellants. They still owned and owed for it at the time the debt herein sued on was contracted, and at the time the writ of garnishment was served on them.

It is next contended by appellants that, they not being parties defendant in the suit, and no relief having been asked against them, and no judgment prayed, the court was without authority to render judgment against them.

Since the passage of the act of April 8, 1889, in reference to judicial garnishments, and the amendatory act of April 19, 1895, "it is no longer necessary to commence a separate action against the garnishee in order to authorize the court to render a final judgment against him, but in cases covered by these acts final judgments may be rendered against the garnishee upon default made by him, or when on a trial the court finds that he is indebted to the defendant in the original judgment." *Norman v. Poole*, 70 Ark. 128. The writ of garnishment in the present case summoned appellant to answer what "property of the defendant they had in their possession," and "further to answer what sums of money they, or either of them, owe the defendant Luxora Gin & Manufacturing Company." Appellee had obtained judgment against the gin company, and the writ of garnishment served on appellant gave the court jurisdiction to hear and determine the issue raised by the allegations contained in the writ. Appellant appeared and answered the writ, denying the allegations and interrogatories which the writ itself contained (which were sufficient), making the distinct issue that "it did not owe the gin company any sum whatever." In *Little Rock Traction & Electric Company v. Wilson*, 66 Ark. 582, 587, this court, through Judge BATTLE, said:

"The writ of garnishment gives the person therein named as garnishee notice of the object of its issue, and commands him to appear at its return day, and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to the defendant. To this extent it serves as a summons and a pleading. The allegations and interrogatories call his attention to, specify and remind him of the goods, chattels, moneys, credits and effects supposed to be in his possession, touching which he is required to answer. If they had not been required by the statutes, there could be no necessity for their filing. The fact that the proceeding instituted by the writ may, so far as it affects the garnishee, be in the nature of an action against him does not render the filing of the allegations and

interrogatories a prerequisite to the investiture of the court or justice of the peace with jurisdiction."

Appellants insist that appellee is barred of any right to maintain this suit by the three years statute of limitation. But appellants did not plead limitation in the lower court. They could have done so. Rood on Garnishment, § 376. They can not be heard here on this plea for the first time.

The judgment is correct. Affirmed.

DAVIS v. STATE.

Opinion delivered July 11, 1910.

1. ABORTION—SUFFICIENCY OF INDICTMENT.—An indictment for criminal abortion which alleges that defendant did unlawfully, wilfully and feloniously administer and prescribe to a certain woman pregnant with child before period of quickening a large quantity of medicine and drugs with the unlawful, wilful and felonious intent then and there and thereby to produce an abortion and premature delivery of said foetus, etc., is not defective in failing to allege that the defendant administered the medicine with the intent to cause the abortion before the period of quickening.. (Page 9.)
2. EVIDENCE—OPINION OF EXPERT.—While a physician, as an expert witness, cannot testify as to his opinion based upon a history of the case given to him out of the court room, it is competent to propound to him a hypothetical question based upon facts that were testified to by other witnesses in the case for the purpose of obtaining his opinion upon such facts thus proved before the jury. (Page 10.)
3. APPEAL AND ERROR—NECESSITY OF OBJECTION TO EVIDENCE.—Where an improper answer of a witness to a proper question was not objected to, and no request was made to have it excluded, its admission cannot be objected to on appeal. (Page 10.)
4. WITNESSES—CROSS EXAMINATION.—It is competent, on cross examination of a medical witness, to submit to him hypothetical questions to test his competency, as well as to affect his credibility. (Page 11.)
5. SAME—COMPETENCY OF REBUTTING EVIDENCE.—Where the defendant had sought to contradict the prosecuting witness in a prosecution for abortion by introducing a letter which seemed to contradict her testimony, and which defendant claimed was written by her, it was competent for the prosecuting witness to prove that the letter was written by one of her relatives, and that she had told such relative the facts therein contained, and also that the charges therein made against defendant's relatives were true. (Page 11.)

6. ACCOMPLICE—EFFECT OF REMAINING SILENT.—The mere fact that one remains passively silent after being informed of a crime, without intending to shield the criminal, does not make him an accessory to the crime. (Page 12.)
7. TRIAL—ARGUMENT.—A statement by the prosecuting attorney in an abortion case that the defendant told two witnesses that he had administered medicine to the prosecuting witness to produce an abortion, and that it was undenied in the case, and defendant could not deny it, was not objectionable as referring to the fact that the defendant had not testified in the case. (Page 13.)

Appeal from Conway Circuit Court; *Hugh Basham*, Judge; affirmed.

Sellers & Sellers and *Moose & Reid*, for appellant.

Indictments for statutory offenses must include all the elements of the offense. 6 Ark. 519; 12 Ark. 609; 29 Ark. 147; 62 Ark. 512; 47 Ark. 488; *Id.* 572. An expert can not base his opinion on the history of the case. 27 Kan. 463; 78 Wis. 84; 40 L. R. A. 836. Besides, a hypothetical question that assumes as true the fact in issue is erroneous. 17 O. St. 522; 51 Pac. 808; 35 Fed. 730. The question as to whether the witness was an accomplice should have been submitted to the jury. 36 Ark. 117; 90 Ark. 461; 12 Cyc. 192. The mere failure to disclose the commission of a felony does not make one an accessory. 43 Ark. 367; 12 S. W. 491. One accomplice cannot corroborate another. 4 Greenl. 65; 42 Conn. 261; 61 S. W. 16; 61 S. W. 756; 61 S. W. 735; 8 S. W. 865; 18 S. W. 645; 44 S. W. 495; 5 Am. St. R. 916. The defendant's failure to testify cannot be made the subject of comment to his prejudice. 62 Ark. 126; 22 Ia. 253; 58 Ia. 473; 61 Ark. 130; 62 Ark. 516; 74 Ark. 256; 70 Ark. 306; 77 Ark. 238; 65 Ark. 625; 75 Ark. 577; 72 Ark. 468; 63 Ark. 174; 74 Ark. 210; 72 Ark. 139; 76 Ark. 276; 65 Ark. 389; 70 Ark. 179; 76 Ark. 370; 89 Ark. 58; 87 Ark. 461; 87 Ark. 515; 81 Ark. 25; 81 Ark. 231; 80 Ark. 23.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

The indictment was sufficient. Kirby's Dig. § § 2228, 2241, 2242, 2243; 84 Ark. 477. The question asked Dr. Steel as an expert was correct. 28 Vt. 554. The prosecuting attorney's remarks were not prejudicial.

FRAUENTHAL, J. The defendant, Lawrence Davis, was indicted by the grand jury of Conway County, charged with the crime of committing an abortion. The charging part of the indictment was as follows: "The said Lawrence Davis, in the county and State aforesaid, on the 1st day of June, 1908, did unlawfully, wilfully and feloniously administer and prescribe to one May Cooper, a woman pregnant and with child and before the period of quickening, a large quantity of medicine and drugs, with the unlawful, wilful and felonious intent then and there and thereby to produce an abortion and premature delivery of said foetus; against," etc.

To this indictment the defendant interposed a demurrer, which was overruled. Upon his trial the jury found the defendant guilty of the crime, and assessed his punishment at one year's imprisonment in the penitentiary and a fine of one hundred dollars.

It is urged by counsel for the defendant that the indictment is fatally defective because it does not charge that the defendant administered the medicine with the intent to commit the abortion before the period of quickening. The crime with which the defendant was charged is defined by section 1570 of Kirby's Digest, which is as follows: "It shall be unlawful for any one to administer or prescribe any medicine or drugs to any woman with child with intent to produce an abortion or premature delivery of any foetus before the period of quickening. * * * And any person offending against the provisions of this section shall be fined in any sum not exceeding one thousand dollars and imprisoned in the penitentiary not less than one nor more than five years. * * *"

The felony thus created by the statute consists in the criminal act of administering or prescribing medicine to the woman with child with intent to produce an abortion. An abortion is the delivery or expulsion of the human foetus prematurely. There must be an intent to cause the abortion without lawful reason, and this must be accompanied by the unlawful act of administering the drug. In the case of *State v. Reed*, 45 Ark. 333, it was held that under this statute the indictment must allege that the criminal act of administering the drug was done "before the period of quickening." That is the time when the overt act must

be committed; and when that act is accompanied by the intent to produce an abortion, the crime is complete. The criminal intent consists in the design to cause an abortion, whether it shall result before or after the period of quickening. The intent becomes criminal by reason of the unlawful design for which the medicine is administered; and when the medicine is administered with this unlawful design, the act becomes criminal, without the necessity of any other or further intent. The criminal act under this statute was complete when the drug was administered "before the period of quickening" for the purpose of causing an abortion; that is, with the intent of causing a delivery or expulsion of the human foetus prematurely. The indictment sufficiently made this charge; and it was not necessary to charge also that the drug was administered for the purpose of causing a delivery or expulsion of the human foetus before the period of quickening.

Upon the trial of the case the defendant introduced as an expert witness, Dr. Steel, a practicing physician. The State had prior to this introduced a witness, Dr. J. C. Cunningham, who had testified that he had examined May Cooper and found certain conditions and symptoms, which he detailed, and which he stated indicated pregnancy. Dr. Steel testified that no positive diagnosis of pregnancy could be made from these conditions and symptoms detailed by Dr. Cunningham. Upon cross examination the following question was propounded to Dr. Steel by the State:

"Q. Assuming that a woman had been criminally intimate with a man for quite a while, and that you received information that she was in a family way, and that an abortion was to be produced, and you was called to see her, and found her suffering with a dilated os, these hemorrhages, and the breasts as mentioned, and if you found softening of the lower vagina with pains bearing down, in your opinion, what would be the matter with her? How would you diagnose that?"

Objection was made to the asking of this question, and, the objection being overruled, the witness answered: "Information beforehand, coupled with this, of course my opinion would be an abortion." There was no objection made to the answer, nor any motion to exclude it.

It is urged that it was erroneous to permit this question to be propounded for the reason that it asked for an opinion based on hearsay alone. But we do not agree with this contention. May Cooper had prior to this appeared as a witness in the case, and had testified to her condition when she was examined by Dr. Cunningham, and she stated that she was pregnant when the drug was administered, and that the defendant had given it to her for the purpose of producing an abortion; and Dr. Cunningham had testified to the details of her condition when examined by him, which are set out in the question. So that all the facts set out in the question propounded to Dr. Steel had been testified to before the jury. The question was not based upon hearsay testimony, but was based upon facts proved before the jury. If it should be considered that this question was propounded to Dr. Steel for the purpose of obtaining the opinion of an expert witness upon a hypothetical question, it was competent because it was based upon facts as proved before the jury. A physician cannot testify as to his opinion based upon a history of the case given to him out of the court room, because such history would be based on statements not made under oath. But it is competent to propound to a physician a hypothetical question based upon facts that were testified to by other witnesses in the case, for the purpose of obtaining his opinion upon such facts thus proved before the jury. *Wigmore on Ev.* § 688; *1 Greenleaf on Ev.*, § 102; *Atchison, T. & S. F. Rd. Co. v. Frazier*, 27 Kan. 463; *Vosburg v. Putney*, 78 Wis. 84; *Heald v. Thing*, 45 Me. 392; *1 Ency. Plead. & Prac.* 145.

We do not think that it was improper to permit the question to be propounded to Dr. Steel. The answer was not responsive to the question, and it was not proper for the physician to state what his opinion would have been if based upon information received, as he said, "beforehand." But the answer was not objected to, and no request was made to exclude it. And we are also of the opinion that this examination was competent for the reason that it consisted of the cross examination of an opposing witness, and its purpose was to test his competency as an expert as well as to affect his credibility as a witness.

It is urged that the court erred in permitting the witness May Cooper to testify to certain abuses that had been visited

upon her by defendant's relatives in the absence of the defendant. This testimony was admitted for the purpose of explaining why a certain letter was written by a relative of the witness. This letter was introduced by the defendant himself, who contended that it had been written by the witness. The object of its introduction was to contradict the witness by its contents; to show that she had written the letter, and that it contained matter which was contradictory of statements made by her on the witness stand. The letter referred to abuses which had been heaped upon her by the relatives of the defendant, and spoke of the defendant in virulent and bitter terms. On the stand she testified that she still loved the defendant. The witness claimed that the letter was written by her relative, and not by her. And it was competent for her to state that she had told her relative of these abuses, inasmuch as such testimony would tend to prove that her relative had the knowledge of the matters about which he wrote in this letter, and therefore would tend to show that he wrote the letter, and not the prosecuting witness.

It is urged that the court erred in refusing to submit by proper instructions to the jury the question as to whether or not Dan Bentley, a witness for the prosecution, was an accomplice, and to charge the jury that, in event he was an accomplice, his testimony should not be accepted in corroboration of the testimony of May Cooper as to the commission of the crime. It appears from the evidence that Dan Bentley resided in the city of Little Rock, and was a friend of the defendant. The witness May Cooper testified that the defendant administered the drug to her at Morrilton, Arkansas, for the purpose of producing an abortion. After the time that it was alleged that this was done the defendant went to Little Rock, and there had a conversation with the witness Bentley. In this conversation the defendant told the witness of the pregnancy of May Cooper, and that he had administered the medicine to her. The witness kept this a secret because, as he said: "I did not think it was necessary to tell any body about it." He stated: "I just simply talked to him about it. I did not suggest anything for him to do." He also testified that he gave him advice as a friend.

It is urged that the witness Bentley was an accomplice, because he was an accessory after the fact. It has been held

by this court that "an accomplice in the full and generally accepted signification of the word is one who in any manner participates in the criminality of an act, whether he is considered in strict legal propriety as principal in the first or second degree or merely as an accessory before or after the fact." *Polk v. State*, 36 Ark. 117; *Hudspeth v. State*, 50 Ark. 534; *Edmonson v. State*, 51 Ark. 115.

It is contended that, by virtue of our statute (Kirby's Digest, § 1562), Bentley was an accessory after the fact because, with knowledge that the abortion had been committed, he concealed his knowledge of the crime. But we are of opinion that the word "conceal," as here used in our statute, implies some act or refusal to act by which it is intended to prevent or hinder the discovery of the crime; that a mere failure to give information is not enough. The mere passive failure to disclose the commission of the crime would not make one an accessory after the fact under our statute. There must be some affirmative act tending toward the concealment of its commission or a refusal to give knowledge of the commission of the crime when same is sought for by the officials of the person having such knowledge. It has been held by this court that the fact that the person knowing of a crime conceals his knowledge of its commission for his own safety does not raise a presumption that he is an accomplice. *Melton v. State*, 43 Ark. 371; *Carroll v. State*, 45 Ark. 539; *McFalls v. State*, 66 Ark. 16. And so mere silence, without the intent to shield the criminal, raises no presumption that the person who is thus passively silent as to his knowledge of the crime is an accomplice. We do not think that there was any testimony adduced in the case which tended to prove that the witness Bentley was an accessory after the fact or an accomplice in the commission of the crime charged against the defendant. He did not act to shield, relieve or assist the defendant, but simply remained passively silent concerning what was told him.

It is urged that the case should be reversed because the prosecuting attorney used unjustifiable language in his argument to the jury. We have examined the remarks complained of, and, while we do not think that all of them were entirely proper, nevertheless we do not think that any of them was

prejudicial. Among the remarks complained of were the following:

"He (referring to the defendant) told Bentley and Dr. Cunningham how he had administered the medicine to her to produce an abortion. And it is undisputed and undenied in this case, and he cannot deny it." These remarks, we think, were but the expression of the opinion of the State's attorney as to the weight of the testimony of these two witnesses, and could not fairly be construed to refer to the fact that the defendant had not testified in the case, and did not tend to create any presumption against him by reason of his failure to testify. *Blackshare v. State*, 94 Ark. 548.

There are other errors which counsel for defendant urge were committed in the trial of this case; but we do not deem it necessary to note them in detail. Some of them refer to certain instructions which were given on behalf of the State and to others which were requested by the defendant, and refused. We have examined each of the instructions that were refused and all that were given. We are of opinion that the instructions given fairly presented every issue, and were correct declarations of the law applicable to the case.

We find no prejudicial error committed in the trial of the case. The judgment must accordingly be affirmed.

PIRTLE v. FELSENTHAL LAND & TOWNSITE COMPANY.

Opinion delivered July 11, 1910.

1. SALES OF LAND—RIGHT TO RESCIND—TIME.—The provision in an executory contract for the sale of town lots to be selected by lot "that if the purchaser, after personal examination by him, is not satisfied with the lot drawn, the full amount paid will be refunded on the day of allotment" is for the benefit of the purchaser, and the stipulation that the refunding should be made on the day of allotment is not of the essence of the contract. (Page 18.)
2. SAME—RIGHT TO RESCIND—TIME.—Even if time were of the essence in a contract which stipulated that a purchaser of a town lot to be selected by a drawing might, if dissatisfied with his allotment, have his money refunded to him on the day of allotment, the seller could not

take advantage of the buyer's failure to demand such refund if the seller afforded the buyer no opportunity on the day of such allotment to express his dissatisfaction and demand the refunding of his purchase money. (Page 19.)

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; reversed.

STATEMENT BY THE COURT.

The Felsenthal Land & Townsite Company is a corporation owning a tract of land in Union County, Arkansas, near the town of Felsenthal, which it proposed as a townsite, and platted into lots. These lots were offered for sale. Appellant became a purchaser of ten of the lots under the following contract for each lot purchased:

"The Felsenthal Land & Townsite Company, of Felsenthal, Arkansas, received of Henry C. Pirtle five (\$5.00) dollars as a deposit on an application for certificate for one lot in Felsenthal, Arkansas, which said certificate shall provide that if the purchaser, after personal examination by him, is not satisfied with the lot drawn, the full amount paid will be refunded on the day of allotment. The remaining payments are to be made to the above named company at its home office as follows: ten dollars (\$10.00) in thirty days, ten dollars (\$10.00) in sixty days, and fifteen dollars (\$15.00) in ninety days from this date.

"G. W. Tugwell, Salesman."

The other receipts were duplicates of the above except the number and date of issue. Appellant paid to appellee under these contracts the sum of \$275. The manner in which the lots were designated and set apart to the purchasers was described by appellant as follows:

The time for allotment was fixed for July 4, 1905, and was something like this: For each lot bought the purchaser received a numbered certificate or receipt, a duplicate of which was put in a sealed envelope, and these envelopes were all put into one basket, and the name of each purchaser was put into a sealed envelope, and these envelopes were all put into another basket; one man took from the basket containing the sealed certificates one envelope, opened it and called the number of the lot; and another man took from the other basket an envelope, opened it and called the name, and that name drew that lot, and the two were pinned together and passed to another man.

This procedure lasted until about 3 o'clock P. M., when the allotment was finished.

The judges and clerks then repaired to a room in its bank building for the purpose of giving to each purchaser the numbers of the lots drawn for him.

Appellant was present at the allotment, and received, between four and five o'clock P. M., the numbers of five of the lots included in his purchase. The agents of the appellee did not give appellant the numbers of the remaining five lots until the next day. Appellant examined the lots by the numbers given him July 4, between five and seven o'clock P. M., and was dissatisfied with them. He went immediately to the place designated for refunding to dissatisfied purchasers, to make known his dissatisfaction with the lots and to demand a return of his money. Appellee had designated but one place where dissatisfied purchasers could demand a return of their money. These were admitted one at a time through one door, were waited on, and passed out another door in the rear of the building. When appellant returned to demand his money, he found several hundred dissatisfied purchasers massed in front of the entrance ahead of him seeking admittance. On account of the throng, appellant could not gain admittance, which he continued to seek until 10:30 o'clock P. M. of July 4. He then retired, but left agents with instructions to remain, and if they effected an entrance to express for him his dissatisfaction and to demand the return of his money. These agents remained until about 1:30 o'clock A. M., of July 5, and, not being able to gain admittance, also retired. Appellant returned about daybreak next morning to the place, but none of appellee's agents were there. Ike Felsenthal, the manager of appellee, appeared between 8 and 9 o'clock A. M., and appellant made known to him his dissatisfaction and demanded the return of his money. Felsenthal refused to refund to appellant his money on the ground that appellant had not applied for it on the day of the allotment. The lots were low and marshy, subject to overflow and practically worthless. Appellee tendered to appellant a deed to five of the lots, but appellant refused to accept it. Appellant brought this suit in the chancery court, setting up substantially the above and alleging that the arrangement provided for dissatisfied purchasers to demand and to have their money refunded was concocted with the

fraudulent intent of preventing appellant from making known his dissatisfaction and of demanding the return of his money. Judgment was prayed for \$275, with interest from July 5, 1905.

Appellee answered the complaint, setting up that it had complied with its contract, "that appellant failed to make demand for the return of his money on the day of the allotment, and that it mailed appellant a deed for the lots allotted to him, and for which he had paid, which deed he holds." Appellee denied that "it conspired so that appellant could not reach its agents on the day of the allotment, but asserted that it did everything to facilitate the handling of the crowd present on the day of the allotment, and that it kept a large force of men at work all night to wait on all who applied."

The court, upon the issue made by the pleadings and the evidence which established the facts substantially as above set forth, made the following findings:

"The court finds that July 4, 1905, expired at 12 o'clock P. M. of the same day. The court further finds that the plaintiff failed on the day of allotment to make any demand of the defendant company for the purchase price of said lots, and failed to offer to return said lots to said company on said day. The court further finds that, as to the said five lots upon which the sum of \$75 has been paid, the defendant company failed to furnish the plaintiff in apt time the numbers of the lots and the numbers of the blocks in which said lots were located, but that said defendant company did on the day of said allotment in apt time furnish to the plaintiff the lot numbers and the blocks of said five lots upon which the plaintiff had made the payment of \$200. The court further finds that the plaintiff is not entitled to recover anything of the defendant as to said five lots whereof the payment of \$200 has been made, for the reason that on said day no demand was made by plaintiff, and no offer was made by him to return said lots to said company. The court further finds that, though no offer was made to return, no demand was made for the purchase money paid on said other lots; but that the failure of defendant company to furnish the numbers of said lots and blocks in apt time on said day excused the plaintiff from making said demand."

And the court rendered the following decree:

"It is therefore considered, ordered and decreed by the court that the plaintiff have and recover of and from the defendants the sum of \$75 with six per cent. interest thereon to this date, towit: Total, \$75 with six per cent. interest thereon from this date until paid, for which he may have execution, and that his prayer for \$200 additional be denied. It is further ordered and decreed that the cost accrued herein shall be paid equally by the plaintiff and defendant."

The appellant has duly prosecuted this appeal.

J. B. Moore, for appellant.

Appellant should have had judgment for interest. 36 Ark. 355; 89 Ark. 41; 43 Ark. 275; 46 Ark. 87; Const. 1874, art. 19, § 13; Kirby's Dig. § 5379. Appellant will be excused from his failure to make demand for his money on July 4. 65 Ark. 324; 61 Ark. 312; 43 Ark. 185; 27 Ark. 61; 25 Ark. 138; 31 Ark. 319; 38 Ark. 174; 90 Ark. 103.

Gaughan & Sifford, for appellee.

Time was of the essence of the contract. 82 Ark. 581; 21 L. R. A. 127; 162 U. S. 404; 78 Ark. 306.

WOOD, J., (after stating the facts). The written instrument in evidence witnessed an executory contract upon the part of appellee to sell appellant certain lots to be selected by lot, upon the payment of the purchase money in the manner specified. The provision in the contract "that if the purchaser, after personal examination by him, is not satisfied with the lot drawn, the full amount paid will be refunded on the day of allotment," is for the benefit of the purchaser, and shows that the contract of purchase on the part of appellant was not to be complete or executed until he had an opportunity for personal examination of the lots drawn and was satisfied with them. If, after having such opportunity, he was dissatisfied, there was no contract of purchase, and the money he had deposited in the mean time was due him. The relation of debtor and creditor was created by the terms of the contract between appellee and appellant as to the money deposited by the latter with the former, the moment appellant was not satisfied with the lots, and the contract clearly contemplated that, if the purchaser was dissatisfied, the money he had paid would be refunded to him. Appellee did not specify that the time the money was to be refunded—the day of allotment—was to be of

the essence of the contract. There is nothing in the contract itself or in the evidence to show that the time for refunding the money was to be of the essence of the contract. On the contrary, the evidence shows that appellee did not regard time of the essence. For it continued the time when the money might be refunded until after the day of allotment.

This court in *Atkins v. Rison*, 25 Ark. 138, through Judge COMPTON, said: "As a general rule, time is not deemed, in equity, to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily results from the nature and circumstances of the contract (2 Story's Equity, § 776); and, even in cases where it clearly appears to have been the intention of the parties to make time of the essence of the contract, equity will relieve the party in default from a forfeiture if he shows a sufficient excuse for nonperformance at the time specified."

But, even if time were of the essence, equity, under the evidence in this record, would not permit appellee to declare the right of appellant to demand a return of the money on the day of allotment forfeited. It would be unjust and a fraud upon the right of appellant for appellee to refuse to refund him his money because he did not demand its return *on the day of allotment*, when appellee had made no adequate arrangement by which appellant could make such demand.

Appellant exercised the utmost diligence and persistency in his efforts to make such demand on that day, but the plan which appellee had provided by which the money could be demanded by and refunded to dissatisfied purchasers on the day of allotment was wholly insufficient. It really amounted to a denial by appellee of any opportunity to appellant to express on the day of allotment his dissatisfaction and to demand the return of the money he had paid appellee.

The evidence showed that it would have taken at least four places like the one provided to have given the dissatisfied throng of purchasers an opportunity to demand the return of their money. The conduct of appellee with reference to the manner and methods provided for refunding the money to appellant was such as to excuse appellant from failing to make a demand for his money on the day of allotment, even if that day was of the

essence of the contract. Equity will not declare a forfeiture under the circumstances disclosed by the evidence in this case.

The court erred in not rendering judgment for appellant for the full amount claimed in his complaint. The judgment is therefore reversed, and the cause is remanded with directions to cancel the deed of appellee to appellant and to enter judgment for appellant against appellee in the sum of \$275, with interest at six per cent. per annum from July 5, 1905, till the day the judgment herein directed is entered.

RINER LUMBER COMPANY v. O'DWYER & AHERN COMPANY.

Opinion delivered July 11, 1910.

MORTGAGES—CONFIRMATION OF SALE BY MORTGAGOR—CONSIDERATION.—The fact that a mortgagee approved of or confirmed a previous sale by the mortgagor of part of the mortgaged property was not binding if such approval or confirmation was made without consideration.

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; reversed.

James D. Head and *Jeff T. Cowling*, for appellant.

Unless appellant has released or waived its lien, appellee is liable. 89 Ark. 342. A release must be based on a consideration. 96 Ala. 454; 31 Ark. 728; 84 Ark. 592. A waiver must either be supported by a valuable consideration or operate by way of estoppel. 72 Ark. 525. A ratification must be with full knowledge of all the circumstances. 70 N. J. L. 808; 64 Conn. 554; 55 Ark. 423. Appellant's conduct did not mislead any one; he is therefore not bound by estoppel. 12 Lea 672; 96 Mich. 113; 55 N. W. 661; 89 Ark. 342; 36 Ark. 96; 82 Ark. 367. There was no question to submit to the jury. 63 Ark. 477; 77 Ark. 290.

William H. Arnold, for appellee.

Appellant is bound by ratification. 80 Ark. 366; 66 Ark. 209; 74 Ark. 393. No new consideration is required to support the ratification. 8 Wall. 267; 44 Ark. 74; 80 Ark. 300; 80 Ark. 15.

BATTLE, J. Riner Lumber Company, a corporation, sued O'Dwyer & Ahern Company, another corporation, for the value of two car loads of lumber on which it had a mortgage. The plaintiff alleged in its complaint that the Arden Lumber Company, being indebted to it in the sum of \$4,280, in order to secure the same, on the 19th day of February, 1908, executed to it a mortgage conveying a large amount of oak and pine lumber, situated on the mill and lumber yards of the Arden Lumber Company, at Arden, in Little River County, in this State; that the mortgage was filed and recorded in that county on the 19th day of February, 1908; that on the 22d day of February, 1908, while the mortgage was in full force and effect and the debt secured thereby was unpaid, the defendant shipped to Texarkana, and converted to its own use a car of said lumber containing 23,518 feet, of the value of \$365.32, and on the 28th day of the same month shipped and converted to its own use another car load of said lumber, containing 24,045 feet, of the value of \$300.56. Plaintiff asked for judgment against the defendant for \$665.88, the total value of the lumber so converted.

The defendant answered and set up its defenses, in which it denied all liability to plaintiff for the lumber claimed by it.

The Riner Lumber Company and Arden Lumber Company were corporations. The former was engaged in buying and selling lumber, and the latter in manufacturing and selling lumber, with its chief place of business at Arden, in Little River County, in this State. They entered into a written contract with each other on the 19th day of February, 1908, the terms of which are ambiguous and difficult to understand.

The Arden Lumber Company undertook in terms to sell to the Riner Lumber Company all the lumber it should produce. When construed as a whole, it only gives to the Riner Lumber Company the exclusive sale of all the lumber manufactured and to be manufactured by the Arden Lumber Company during the life of the contract. The latter agreed to load into cars and to receive as compensation for selling ten per cent. of the former and to forward the bill of lading of such shipment to it, and the former was to account to the latter for proceeds of sale, and to receive as compensation for selling ten per cent. of the net proceeds. The former agreed to and did advance at the time seven dollars per thousand feet upon the lumber on the yards,

and took a mortgage thereon of even date with the contract for an advance of \$4,280, due thirty days after date, bearing interest at the rate of eight per cent. per annum, and filed and recorded in the proper office on the same day. The contract further provided that the former, the Riner Lumber Company, might take an inventory of all lumber stacked on the yards of the latter between the 15th and 25th days of each month during the term of the contract, and that at each time when taken, if it was shown that the lumber on the yards at \$7 per thousand feet exceeded the amount then due, an additional advance would be made, so that the latter, Arden Lumber Company, might at all times have by way of advance as much as seven dollars per thousand feet.

A short time after this contract was entered into and the mortgage was filed for record the Arden Lumber Company, without the knowledge of the Riner Lumber Company, about the 22d and 28th of February, 1908, shipped to the defendant two car loads of the lumber so mortgaged, which it (defendant) converted to its own use, for the value of which this action was instituted. After this, on the 19th of March, 1908, Mr. Riner, president and principal stockholder of the Riner Lumber Company, went to Arden for the purpose of making an inventory of the lumber then on hand. When so doing, the president and manager of the Arden Lumber Company informed him of the sale and shipment of the two car loads of lumber to the defendant and asked his approval. After the inventory or stock sheet was taken a new mortgage was given for the balance due, \$3,776.17, and it recites that the lumber on the yards aggregated \$3,776.17 as per stock sheet. The new mortgage did not include the lumber sold and shipped to the defendant.

Riner returned to Arden on the 1st of May, 1908, and took another inventory and a new mortgage for the balance due, \$2,371, and the mortgage recites: "Said lumber aggregating the sum of \$2,371, as per stock sheet of May 1, 1908."

Witnesses differed as to the plaintiff approving and confirming the sale and shipment of lumber to the defendant, and the court submitted that question to the jury, and they by a special verdict answered that it did; and the court rendered judgment in favor of the defendant.

The court erred in rendering judgment in favor of the defendant upon the verdict of the jury. The approval or confirmation of the sale and shipment of lumber to the defendant, without consideration, was not binding upon the plaintiff, and was not sufficient to relieve the lumber from the mortgage of plaintiff and the defendant from liability for the value of the lumber; and the undisputed evidence did not show that there was a consideration received by the plaintiff. The question as to whether there was a consideration for the approval or confirmation of the sale and shipment of lumber to the defendant was not submitted to the jury, and was not considered or decided.

Reverse and remand for a new trial.

HARDWICK v. MARSH.

Opinion delivered July 11, 1910.

REAL ESTATE BROKERS—WHEN AGENT'S AUTHORITY EXCLUSIVE.—Where a broker is given the right to sell certain land for a definite period of time, it will be implied that his right to sell during that time is exclusive, and the revocation of his agency, either directly or by making a sale of the property, renders the owner liable to the agent for his commission.

Appeal from Lonoke Circuit Court; *Eugene Lankford*, Judge; affirmed.

Geo. M. Chapline, for appellant.

The fact that a person has employed a broker to negotiate a sale does not, in the absence of a special contract, deprive him of the right to negotiate; and if he procures a sale without any agency of the broker, he is not liable to the latter for a commission. 4 Am. & Eng. Ency. 979; 55 Ark. 574.

Thomas C. Trimble, Joe T. Robinson and Thomas C. Trimble, Jr., for appellee.

Appellee is entitled to his commissions. 9 Cyc. 285; 19 Cyc. 222; 78 N. Y. 300; 7 N. C. 422; 26 O. St. 334.

HART, J. This is an appeal by J. D. Hardwick from a judgment rendered against him in the Lonoke Circuit Court in

favor of C. R. Marsh for the sum of \$300 for commissions alleged to be due him in the sale of land.

The only assignment of error pressed upon us for reversal is that the evidence does not warrant the verdict. The evidence is practically undisputed, and is substantially as follows:

J. D. Hardwick resided in Ardmore, Oklahoma, and owned certain real estate in Lonoke County, Arkansas, which he wished to sell. C. R. Marsh was a real estate broker located at Carlisle, Arkansas, near where the land was situated. The record shows the following correspondence between the parties in regard to contract of agency for the sale of the land:

"Ardmore, Okla., April 4, 1909.

"Mr. C. R. Marsh,

"Lonoke, Ark.

"Dear Sir: I received your postal some few days ago, and will say that I have 120 acres of land in your (Lonoke) county out from the town of Lonoke five or six miles, and would like to sell it if possible. I had two offers a year ago on this land, but did not pay either any attention. Described as follows: North half of the southeast quarter and southeast quarter of section (2) in township one north eight west of the 5th principal meridian, in Lonoke County, Arkansas. If you can locate this land and find a chance to get an offer on it, let me know, and I will allow you a good commission, and oblige,

"J. D. Hardwick.

"Let me know what you think would be a fair price for the land."

"Ardmore, Okla., April 8, 1909.

"Mr. C. R. Marsh,

"Carlisle, Ark.

"Dear Sir: Yours of the 7th to hand, and in reply will say that I do want to sell my 120 acres near Lonoke, and you may send me your contract, which I will sign, also giving price which I would take for land.

"Respectfully,

"J. D. Hardwick."

"Lonoke, Ark., April 12, 1909.

"J. D. Hardwick,

"Ardmore, Okla.

"Before sending you a contract to sign, I will have to know just what our best terms are on the place. You understand that

I mean how much cash you want and how long a time you will give on the balance. You understand, of course, no land notes draw more than six per cent. interest. I think I can sell your land for \$18 net to you. If you will write me the least cash that you will take and the number of years you will give on the balance, I will send you contract to sign, giving me six months to sell in. This, I think, will be all the time I need to sell in. Let me hear from you.

"Your truly,

"C. R. Marsh."

"Ardmore, Okla., April 26, 1909.

"Mr. C. R. Marsh,

"Carlisle, Ark.

"Dear Sir: Yours to hand in regard to price I want for my 120 acres in Lonoke County. I learn through the newspapers that a rice mill is being put in at Lonoke, and that times are picking up some there, and my land, or the most of it, is suitable for rice culture, and I have decided to hold my land for the small sum of \$25 per acre net to me. Would like to have cash, and can give one, two or three years for balance. This offer good for six months.

"Respectfully,

"J. D. Hardwick."

"Ardmore, Okla., October 21, 1909.

"Mr. C. R. Marsh,

"Carlisle, Ark.

"Dear Sir: Your telegram and letters to hand, and I regret to say that you were just two or three days too late, as I had sent deeds and so forth to the Lonoke Real Estate Co., and sale made. I beat your figures some, not much. However, had your letter been sooner, I would have, of course, stuck to my agreement. I have some other lands in Arkansas, and as soon as I can get my papers in shape will give you list of same. I thank you for the interest you have taken in the matter.

"Very respectfully,

"J. D. Hardwick."

On the 18th day of October, 1909, Marsh contracted to sell said land to H. Colvin for \$27.50 per acre, and in pursuance of the contract of sale, Colvin paid him \$200, and was ready, willing and able to consummate the sale by paying the balance of the pur-

chase price. Hardwick refused to make the sale for the reason that he had already sold the land as stated in his letter of October 21, 1909; and also refused to pay Marsh any commissions. Hence this suit.

This case is ruled by that of *Blumenthal v. Bridges*, 91 Ark. 212. It is clear that the letter of Hardwick, dated April 26, 1909, constituted Marsh his agent to sell the land for the period of six months. In the case cited the contract of employment was for a definite period of time, and the court, in discussing the question presented for our determination here, said:

"Appellants contend that the contract was not one for exclusive agency, and that they had the right at any time before a sale was negotiated by appellee to revoke it. They rely upon numerous cases which announce the general rule that where real estate is placed in the hands of an agent or broker for sale in the ordinary way, without a stipulation to the contrary and without specifying any definite period of time within which the agent is to have the exclusive right to sell, this does not deprive the principal of the right to sell the land himself when he acts in good faith toward the agent, and that in such cases there is an implied reservation of the right of the principal to sell, free from any charge or liability for commission. (Citing cases.)

"Those cases do not however, announce the controlling principle in this case, for here the contract expressly stipulated for a definite period of time within which the agent might make a sale. In such case the contract implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency unless there is a reservation to the contrary."

* * * "Now, if the principal cannot, under a contract of this kind, stipulating a definite time which the sale may be made, revoke the agency directly, it follows that he can not do so indirectly by making a sale of the property himself, thereby putting it beyond the power of the agent to perform the contract. The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby."

There is no dispute as to the amount of commissions due if any are due.

Applying the principle decided in the above case to the facts in the case at bar, it follows that the judgment must be affirmed.

FERGUSON v. WEST COAST SHINGLE COMPANY.

Opinion delivered July 11, 1910.

1. SALES OF CHATTELS—ACCEPTANCE—DELAY.—Where it was the custom of a trade for the seller to notify the buyer by wire of the acceptance of his order, and the buyer waited four days without hearing from the seller, he was justified in treating the order as not accepted. (Page 31.)
2. SAME—VARIATION FROM ORDER.—Where defendants ordered two carloads of shingles, one to contain from 302 to 309 thousand shingles, and the other to contain from 273 to 298 thousand shingles, and plaintiff shipped one car containing 309 thousand shingles and another containing 328¾ thousand shingles, the contract was indivisible, and the defendants were justified in rejecting the whole quantity tendered and shipped as not being in compliance with the order. (Page 31.)

Appeal from Sebastian Circuit Court, Fort Smith District;
Daniel Hon, Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellants, alleging that on the 17th day of September, 1907, appellants bought of appellee 673,750 sixteen-inch red cedar shingles at \$4.03 per thousand; that said shingles were diverted to the appellants on the 18th day of September, 1907; that appellants refused to receive them, to the damage of appellee in the sum of \$162.60, for which appellee prayed judgment. Appellants' answer was a denial of all the material allegations of the complaint. The testimony on behalf of the appellee tended to prove that on the 17th of September, 1907, it sent out a "circular quotation," giving a statement of shingles owned by appellee which were then in transit to recon-signing points. The statement showed the kind, quality and quantity of shingles in car load lots to be designated in ordering by wire with certain code words which were given in the circular. The circular was sent out to about one thousand dealers throughout the country, and to appellants among them. On September 18 appellee received of appellants the following telegram:

"Fort Smith, Ark., Sept. 17, 1907.

"West Coast Shingle Co., Tacoma:

"Yours of the 12th; divert to Home Lumber Company, Van Buren, Arkansas, car Hash or Hawk and to us here car Heel or Hare at four three.

"Ferguson Lumber Company."

This telegram meant, according to the code words of the circular which appellants used in making the order, that appellants ordered of appellee two carloads of shingles at the rate of \$4.03 per thousand, one car to consist of from 302 to 309 thousand of shingles and to be diverted from shingles then in transit to the Home Lumber Company of Van Buren, Arkansas, and one car to consist of from 273 to 298 thousand of shingles, and to be diverted from shingles then in transit to appellants at Fort Smith. Immediately upon the receipt of the telegram, appellee diverted two carloads of shingles of the quality designated from its stock in transit. One of these cars diverted contained 309 thousand shingles, and the other contained 328¾ thousand, at \$4.04 per thousand. The appellee by letter of September 18, 1907, inclosed bills of lading for the shingles to the agents of the railway companies, instructing them to deliver the car containing 309 thousand shingles to the appellants at Van Buren as directed by the telegram, and to deliver the other car containing 328¾ thousand to appellants at Fort Smith. Appellee also on the same day sent by letter invoices of the cars diverted to appellants. On September 21, 1907, appellants sent to appellee a telegram instructing it to cancel their order and saying: "Have bought two cars which are already here." Appellee declined to cancel the order, and, after considerable correspondence, the result was that, appellants having refused to accept the cars, appellee sold them to another party for the best price it could obtain and sustained a loss in having to resell them of \$158.45.

The testimony on behalf of appellants also tended to show that only one of the cars ordered by appellants was diverted to them, the other car was not embraced in the order at all. But, instead of one of the cars ordered by appellants, appellee substituted an entirely different car containing some 30 thousand more shingles than the car ordered. The witness who made the order for appellants testified in part as follows:

"It is important for a lumber dealer to get the exact cars of shingles that he orders. He wants to know the number of shingles in his cars at the time he buys them. There was just one order for the two cars of shingles. It takes as long as two months, and sometimes as long as a year to get a carload of shingles from Tacoma. I don't know whether these cars were in transit at the time the order was given. It is customary to send out the circular letter to dealers immediately after the cars are started en route. There were fifteen cars of shingles described in this circular. I know it is customary for sellers to send the same circular to a great many dealers throughout the country. I waited from the 17th until the 21st for word from plaintiff as to whether or not my order would be filled. It is customary for shingle sellers to notify purchasers by wire immediately after receiving an order to divert a car of shingles to the purchaser. Heretofore I have always received a message from the seller of shingles notifying me if my order would be filled, when ordering in the manner done in this case. I have had many years' experience in the lumber business, and it has always been customary for the seller to notify the buyer by wire of the acceptance of his order. I knew that the same circular had been sent to many other dealers, and did not know whether my order would be filled or not; and, after waiting four days for a reply, I got shingles elsewhere and cancelled this order. Some days later I received invoices for two car loads of shingles, but immediately returned same to the plaintiff, and notified them that I would not accept the shingles. After sending the telegram directing plaintiff to divert these two cars to me, I did not know whether or not they were going to accept the order; and, knowing that this was only a circular quotation, and not a private letter, and, knowing that these circular quotations were usually sent to hundreds of dealers and not being able to hear from the plaintiff in reply to my telegram, I bought shingles elsewhere, and cancelled this order before receiving any word whatever from plaintiff."

Appellee took nonsuit for the car that was not contained in appellant's telegram. Among the instructions given on behalf of appellants were the following:

"1. If you believe from the evidence that the plaintiff, West Coast Shingle Company, sent to the defendants a circular letter containing a list of the cars of shingles in transit, owned by the

plaintiff; and if you further believe that defendants on the 17th day of September, 1907, wired plaintiff to divert to it a certain car or cars of shingles, and to the Home Lumber Company of Van Buren, Arkansas, a car or cars of shingles; and if you further believe that the plaintiff did not notify the defendant of its acceptance of defendant's order for said car or cars within a reasonable time, then the court instructs you that defendant had the right to disregard said order, and to purchase such shingles elsewhere, and your verdict under those circumstances should be for the defendant.

"2. If you believe from the evidence that the plaintiff sent out the circular letter in evidence, and that defendant wired plaintiff to divert to it certain cars of shingles; and if you further believe that the plaintiff did not divert to defendant the identical cars ordered by defendant, but attempted to divert to it another or other cars containing a different amount of shingles, then the court instructs you that there was no contract between plaintiff and defendant for the purchase of the shingles tendered, and your verdict must be for the defendant.

"3. If you believe from the evidence that the defendant wired the plaintiff to divert to it at Fort Smith a car or cars of shingles, designating in said telegram "Heel" or "Hare;" and if you further believe that the word "Heel" as used in said telegram referred to G. N. car No. 36058 containing 273,000 shingles, and the word "Heel" referred to C. B. & Q. car No. 95209 containing 289,000 shingles; and if you further believe that the plaintiff failed to divert either of said cars to defendant, but attempted to divert to it, in lieu thereof, N. P. car No. 27104 containing 328¾ thousand shingles, then the court instructs you that the defendant was not required to accept said shingles or any part thereof, and your verdict must be for the defendant."

The jury returned a verdict in favor of appellee for \$77.80. The motion for new trial contained, among others, the following grounds: 1. Because the verdict is contrary to law; 2. Because the verdict is contrary to the evidence. The motion was overruled, and judgment for appellee for the above sum.

Hill, Brizzolara & Fitzhugh, for appellants.

The unreasonable delay excused defendants from receiving the goods. 47 Ark. 419. The defendants were not required to

accept the shingles or any part thereof. 81 Ark. 29; 90 Ark. 272; 71 Ark. 292; 73 Ark. 584; 15 Atl. 87; 62 N. Y. 151; 103 Mass. 327.

WOOD, J., (after stating the facts). The judgment should have been in favor of appellants for two reasons:

1. The undisputed evidence showed a custom "for the seller to notify the buyer by wire of the acceptance of his order," where the order, as in the present case, is made by wire. Appellee did not comply with this custom, and appellant, not knowing whether his order would be filled or not, after waiting four days, cancelled same. Under this custom there was no completed contract between appellants and appellee for the purchase of the shingles. Appellee did not notify appellants by wire of the acceptance of the latter's order, and appellants had no notice that their order by wire had been accepted until they received a letter from appellee containing invoices a week or ten days after the order had been telegraphed. Appellants had the right to rely upon the custom and to cancel their order after waiting four days. For, as a matter of law, appellants were warranted in treating a delay of four days to answer the telegram by like method as unreasonable. The nature of the business, the manner in which it was conducted when orders were made by wire, and the usage of the trade, as shown by the evidence, made the delay of appellee to answer by wire unreasonable. *Kempner v. Cohn*. 47 Ark. 519.

2. The telegram constituted but a single order for shingles although it specified two cars each for separate destinations. The appellee had no right to ignore the terms of the order and send appellants an entirely different car from that contained in the order. By so doing appellee failed to accept the contract proposed by appellants. Consequently, there was no meeting of the minds of the parties upon the cars that were diverted to appellants, and they were not liable. The contract proposed by appellants was single and indivisible. *Union Trust Co. v. Weber-Seely Hdw. Co.*, 73 Ark. 584; *Sutherland Med. Co. v. Baltimore*, 81 Ark. 229; *Wood v. Kelsey*, 90 Ark. 272. Any material variation from it as to the specific quantity of shingles ordered justified appellants in rejecting the whole quantity tendered and shipped as a compliance with the order. See *Rommel v. Wingate*,

103 Mass. 327 and cases cited; *Perry v. Mount Hope Iron Co.*, 15 Atl. Rep. 87; Hunt on Tender, § 216.

The testimony on behalf of appellants tended to show that they would not have made the order for one car and not the other. The witness said: "It was important for a man to get the car containing the number of shingles he orders. If he did not get the car he ordered, it would be very hard for him to tell exactly how his stock is going to be, and he certainly uses discretionary power in the amount he wants, or they might send any car."

The court instructed the jury on behalf of appellants in accord with the doctrine here announced, but they ignored the instructions. The verdict for the reasons stated was contrary to the evidence and the law. The judgment based upon such erroneous verdict must therefore be reversed, and the cause is dismissed.

ARKANSAS MIDLAND RAILWAY COMPANY v. ROBINSON.

Opinion delivered June 27, 1910.

1. CARRIERS—DUTY AS TO PLATFORMS.—It is the duty of a railway company to exercise ordinary care to keep its platform in a safe condition for the use of its passengers and others who have a right to go there. (Page 35.)
2. SAME—NEGLIGENCE—EVIDENCE.—Where there was testimony tending to prove that plaintiff went upon defendant's depot platform for the purpose of taking passage upon the cars, and that her heel caught in a small hole in the platform steps, and she lost her balance and fell, and was injured, a finding that the defendant was negligent and that plaintiff was not negligent will be sustained. (Page 35.)
3. APPEAL AND ERROR—HARMLESS ERROR.—It was not prejudicial error, in an action for injuries received by a passenger in falling from a defective platform at a railway station, to refuse to permit a witness for the railway company to testify whether the platform and steps where plaintiff was injured had proved reasonably safe for passengers going to and from the train if the witness was permitted to state that no one else had fallen from the platform during the time the witness had been station agent. (Page 36.)

4. DAMAGES—PERSONAL INJURIES—MENTAL SUFFERING.—Where, in an action to recover damages for personal injuries, it appeared from the evidence that mental pain was inseparable from the physical suffering of the plaintiff, it was not error to instruct the jury in assessing the damages sustained by plaintiff to take into consideration the mental pain and anguish suffered by her. (Page 36.)

Appeal from Lonoke Circuit Court; *Eugene Lankford*, Judge; affirmed.

STATEMENT BY THE COURT.

Lila E. Robinson brought suit against the Arkansas Midland Railway Company to recover damages on account of the alleged negligence of said railway company in failing to provide a safe platform for its passengers.

The railway company answered her complaint, and denied the alleged ground of negligence, and alleged contributory negligence on her part.

On the 26th day of August, 1909, Lila E. Robinson went to the depot of the Arkansas Midland Railway Company for the purpose of taking passage on one of its trains. The distance from the depot platform to the passenger coach, which she wished to enter, was such that she could not step from the platform to the coach with safety. The most practical route to the coach was by the steps on the side of the platform to the ground and from there to the train. As she placed her right foot on the first step in her descent from the platform, she began to stumble, and fell down the steps. She had a suit case in one hand and a box in the other. She did not remember what caused her to stumble and fall. The fall rendered her unconscious, and she remained in that condition for about 10 hours. She required the services of a physician for five or six days after she received the injury. She suffered severe pains, chiefly from her head and from her hips, and still continued to suffer pain after the physician had dismissed her case. Her foot was 9 inches long. The height of her shoe heel was $2\frac{1}{4}$ inches, and they were about $1\frac{1}{4}$ inches lengthwise. She was right up at the top step, where the platform and the top step join, when she began to fall. The top of the platform at that point is about $4\frac{1}{2}$ feet from the ground. Its approach was by open steps, 8 in number. The top step extends back up under the end of the planks of the platform.

It is only about 8 inches out beyond the platform, and about 3 or 4 inches below it. Just before the top step is reached, there is a hole in the platform about $10\frac{1}{2}$ inches long and about $1\frac{1}{2}$ inches wide.

Wash. Harris, an old negro, who was near and saw the accident, described it as follows:

"Q. State her movement as well as you can, just before and about the time she fell. A. She had got to the step, and she placed her right foot on the first top step, and then right from that she began to fall, with a curious kind of twisting move, and I says, 'Man, that lady is going to get a fall!' Then by this time she had begun to fall, and by the time she hit the second or third step she made to catch with her left hand, and her suit case fell off. Q. Where was her left foot? A. Her left foot was coming, dragging along behind. Q. What was right there under her left foot at that place? A. There was a hole in the floor right there. Q. Her left foot was about that portion of the platform, where she began to fall? A. Yes, sir. Q. And then she put her right foot on the top step? A. Yes, sir. Q. Then she fell on to the concrete walk, did she? A. Yes, sir."

The case was tried before a jury, which returned a verdict in favor of the plaintiff for \$2,000. From the judgment rendered the defendant has appealed to this court.

W. E. Hemingway, E. B. Kinsworthy and Jas. H. Stevenson, for appellant.

Where a platform is not obviously dangerous and has been in use for years and proved safe, it may be continued without the imputation of negligence. 2 Hutch. Car., § 933; 58 Ill App. 130. A railroad company is not liable for the accidental injury of a passenger. 107 N. C. 178; 11 S. E. 991; 2 Hutch. Car., § 933. Physical injury does not raise a presumption of mental suffering. 125 Mass. 90; 28 Am. R. 93. The mental suffering must be caused by the injury, and the consequence of defendant's negligence. 89 Ark. 58; 65 Ark. 177.

H. A. Parker, for appellee.

HART, J., (after stating the facts). 1. It is insisted by counsel for appellant that the evidence is not sufficient to support the verdict.

"As a general rule, railroad companies are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do, or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go; and especially by those routes and methods which the company have established by its own customs and practice, as here. This is well established." *Texas & St. Louis Railway v. Orr*, 46 Ark. 182, and cases cited at p. 195. Hence it will be seen that it is the duty of the railway company to exercise ordinary care to keep its platform in a safe condition for the use of its passengers and others who have a right to go there.

Tested by this rule, it cannot be said, as a matter of law, under the facts and circumstances adduced in evidence in this case, that the appellant company was not guilty of negligence, or that appellee was guilty of contributory negligence.

Appellee was on appellant's depot platform for the purpose of going to one of its trains, which carried passengers, and of taking passage thereon. It is undisputed that there was a hole in the platform at the place where she began to fall. The negro, Wash. Harris, says that he was looking at her as she walked along. That, as she placed her right foot on the top step, she began to fall "with a curious kind of twisting move." That at the time her left foot was on the platform, and that there was a hole in the platform there. Other evidence shows that the hole was sufficiently large for the heel of her shoe to have become caught, or to have turned in it. That her foot was 9 inches long, and that the top step extended only eight inches out beyond the platform and was only $3\frac{1}{4}$ or 4 inches below it. Under these facts and circumstances, reasonable men might have inferred that her left heel became fastened in the hole in the platform or that stepping in the hole caused her foot to turn as she was in the act of stepping off of the platform; that the movement of her body, being forward and downward, when her foot got caught, turned, or caused the "curious twisting" movement described by Harris, and that the swaying of her body caused her to lose her balance and to fall headlong to the bottom of the steps.

It is true that she states that she does not remember what caused her to fall, but she also states that she was fairly active, and that she was not subject to fainting spells. When we remember that the force of the fall was so great that she fell headlong to the bottom of the steps, it is not unreasonable that the jury might have found that the injury was received in the way we have described; and that the fact that it happened so quickly and unexpectedly and that appellee was unconscious for ten hours afterwards may have prevented her from remembering that her foot was caught.

The jury was also warranted in finding that appellee was not guilty of contributory negligence; for the hole was not so large that she in the exercise of ordinary care must have seen it while walking along the platform.

2. It is next contended by counsel for appellant that the court erred in refusing to permit the witness Lusk, who was the station agent, to answer the following question:

"Has this platform and steps proved reasonably safe for passengers coming to and from the train?"

The ruling of the court resulted in no prejudice to appellant, conceding that the witness would have answered in the affirmative, and that the answer would have been competent evidence. The court immediately permitted the witness to state that no one else had fallen from the platform at that point during the time he had been station agent. This was practically an answer, in another form, to the question, and had as much probative force as would have resulted from an affirmative answer to the question objected to.

3. It is also contended that the court erred because it told the jury in assessing the damages sustained by appellee to take into consideration the mental pain and anguish suffered by her. Under the facts and circumstances adduced in evidence, the mental pain was inseparable from the physical suffering of appellee. This question was determined adversely to the contention of appellant in the case of *Arkansas Southwestern R. Co. v. Wingfield*, 94 Ark. 75.

No other assignments of error are urged for reversal, and the judgment will be affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. RAMSEY.

Opinion delivered July 11, 1910.

1. MASTER AND SERVANT—DUTY IN OPERATING RAILROAD.—The duty of opening and closing switches is one which devolves upon the railroad company, rendering it liable where the negligence of a fellow servant in this regard injures an employee. (Page 38.)
2. SAME—NEGLIGENCE—PRESUMPTION.—Where a railroad switch was left open, so that a train ran into it, whereby plaintiff's intestate, an employee of defendant railroad company, was killed, a *prima facie* case of negligence is made out against the railroad company. (Page 39.)
3. SAME—PRESUMPTION OF NEGLIGENCE—REBUTTAL.—Where the presumption of negligence on the part of a railroad company in regard to leaving open a switch, whereby a train was derailed and plaintiff's intestate killed, was overcome by reasonable and uncontradicted proof showing that the railroad employees were not negligent, a verdict for the plaintiff will be set aside. (Page 39.)

Appeal from Faulkner Circuit Court; *Eugene Lankford*, Judge; reversed.

STATEMENT BY THE COURT.

This is a suit brought by E. A. Ramsey, administrator of the estate of S. J. Calhoun, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. The complaint alleges that on the 2d day of January, 1908, the deceased, S. J. Calhoun, was a locomotive engineer employed by the defendant; that on that day, at about the hour of 6 o'clock P. M., while the deceased was in the performance of his duty as engineer of a through freight train going north on the main line of the defendant's railroad, the engine ran into an open switch at Campbell, in Jackson County, Arkansas, and turned over, and in the wreck the said S. J. Calhoun was caught between the cab and tender and instantly killed. The defendant was negligent in permitting the switch to be open, and its negligence caused the death of the said S. J. Calhoun; that said S. J. Calhoun left surviving him as his next of kin five brothers, to-wit: John Calhoun, W. R. Calhoun, Malcolm Calhoun, Louis Calhoun and C. T. Calhoun, and three sisters, Mrs. D. Martin, Mrs. J. M. Bell and Mrs. Elizabeth Hyatt. The said S. J. Calhoun also left surviving him his wife, Lula Calhoun, aged years, who

was dependent upon him for support, and to whose support he contributed the sum of \$125.00 a month. The said S. J. Calhoun was 47 years of age, in good health and industrious, and earning at the time of his death \$150.00 a month. This suit is prosecuted for the benefit of the wife and next of kin of the deceased. And the plaintiff as such admisintrator was damaged by the death of the said S. J. Calhoun, caused by such negligence of the defendant as aforesaid, in the sum of \$20,000. Wherefore the plaintiff, as administrator, prays judgment against the defendant for the sum of \$20,000.

The defendant railway company answered, denying liability, and averred that the switch was opened by a stranger, and was not left open by the defendant, or by any of its agents, employees or servants.

There was a trial before a jury, which resulted in a verdict for the plaintiff in the sum of \$7,500. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

W. E. Hemingway, E. B. Kinsworthy, and James H. Stevenson, for appellant.

The verdict is not supported by the evidence. 79 Ark. 76; 74 Ark. 19; 79 Ark. 437; 90 Ark. 326; 44 Ark. 524; 46 Ark. 555; 51 Ark. 467; 77 Ark. 367; 48 Ark. 460; 179 U. S. 658; 139 Fed. 737; 132 Fed. 593; 142 Fed. 320; 114 Fed. 739; 70 Ia. 561; 119 Ga. 837.

J. H. Harrod, for appellee.

Appellant waived the alleged error in the court's refusal to dismiss the case at the close of plaintiff's testimony by introducing evidence. 79 Ark. 401.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that the evidence did not warrant the verdict. The complaint does not allege that the switch or any of its appliances was defective, but only alleges that the defendant negligently permitted it to be left open and so to carry the decedent's train from the main track to the side track, where it was derailed, causing the death of the engineer. Hence it will be seen that the negligence complained of was not in the construction, preparation or repairs of the railroad, but in its operation. Hence the character of the duty (the opening and closing of the switch), the negligent performance of which is

alleged to have caused the injury, was a duty in relation to the operation of the railroad. 3 Elliott on Railroads, § § 1276 and 1318; 26 Cyc. 1127-8 and 1325; *Chicago, I. & L. Ry. Co. v. Barker* (Ind.), 14 Am. & Eng. Ann. Cases, 375, 17 L. R. A. (N. S.) 542 and notes to same; *Houston & T. C. R. Co. v. Shapard*, 118 S. W. (Tex. Civ. App.) 596.

While the duty to operate carefully rests upon the servants of the railway company, in view of our fellow servant act, it becomes immaterial to ascertain what servant is careless in that respect; for the railway company is liable for the negligent acts of the fellow servants of the complaining party. *St. Louis, I. M. & S. Ry. Co. v. Davis*, 93 Ark. 484.

It is not disputed that the switch was open, and that the train ran into it and became derailed, thus causing the death of the engineer. While, in an action against a railroad company by an employee to recover damages, negligence of the railroad company will not be presumed from the happening of the accident, but must be proved by the plaintiff, yet it follows from the authorities cited that a *prima facie* case of negligence against the defendant company in the operation of its trains was made out by the plaintiff by showing that the switch was open, and that the train ran into it whereby engineer Calhoun was killed. No other evidence was adduced at the trial tending to show negligence on the part of the railway company.

The remaining question, then, is, was this presumption of negligence overcome by the evidence in behalf of the defendant company? We think it was. From the evidence it appears that Campbell's switch is what is known as a "blind switch." That is, it has no telegraph station or agent. It is north of Newport, Arkansas, between Diaz on the south and Tuckerman on the north. It is about 2.05 miles north of Diaz and a little over six miles south of Tuckerman, both of which are telegraph stations. The train sheets were introduced showing the times all trains passed Newport, Diaz and Tuckerman on the day the accident occurred.

Extra No. 67, northbound, (the derailed train) left Newport at 5:50 P. M. on the day in question. According to the testimony of its conductor, it ran into the open switch at about 6:05 P. M., and this was about the time it was due to arrive at Campbell's switch according to its schedule. The northbound

trains preceding it were Nos. 92 and 66. No. 92 was a local freight, which left Newport at 2:25 P. M. It passed Diaz at 2:44 P. M., and should (by estimate) have passed Campbell's switch about eight minutes later. No. 66, northbound, left Newport at 3:45 P. M., passed Diaz at 3:55 P. M., and Campbell's switch at about 4:02 P. M. The last train that passed Campbell's switch on the day the accident happened before No. 67 was derailed there was No. 3. It was a southbound fast passenger train. It passed Tuckerman at 5:29 P. M., and Campbell's switch from six to eight minutes later. It passed Diaz at 5:40 P. M., and arrived at Newport at 5:45 P. M. Extra No. 67 (the derailed train) waited at Newport for No. 3 to reach there. The engineers and conductors of these trains were introduced as witnesses, and testified that their trains passed Campbell's switch without stopping. The section foreman who had that portion of defendant's track, including Campbell's switch, testified that the wreck occurred at about 6 o'clock P. M.; that he had lighted the switch lights there at something like 5:30 P. M. that day; that the switch was closed then; that he saw no trains on the switch on that day. The switch and switch stand were examined by the person in charge of the wrecking crew, which came from Newport soon after the accident happened. He said that the switch was thrown for the side track, and was in good condition; that there was nothing wrong except the switch lock; that the broken lock was hanging to its chain, and the face of the lock was all battered up and indented; that the switch point was all right; that it was not possible for the switch to have been opened when No. 3 passed coming south, and not have been damaged thereby; that there were some of the wheels of the cars right on the points of the switch, so that they could not have been thrown after the wreck; that the switch lock was freshly broken.

The general superintendent of the railroad said Campbell's switch was used only in cases of emergency, and that whenever possible train dispatchers avoid having trains meet at places other than telegraph stations; that, if the switch at Campbell's had been lined up for the side track when No. 3 came south, the switch would have been damaged in several places, and would have to be repaired; that either the points would be bent or the switch stand damaged or broken.

A civil engineer testified, as an expert, that if the switch had been set for the side track it would have been impossible for a train coming south at the rate of 30 or 35 miles an hour to run through it without damaging it or tearing it up; that, had it been open, the connecting rod and bridle point and the rod which connects the points to the switch stand, one or all of them, would be broken; that if a train is running fast it will break the switch stand, and if it is running slow it will bend the switch points.

A Mrs. Mattie Walton testified that shortly after the wreck she overheard a conversation between a man named Bill Sharp and her husband, in which Sharp stated that he had broken the lock and thrown the switch.

It will be seen that the last train going north before the accident happened was No. 66. It passed Campbell's switch at about 4 o'clock P. M., and did not stop there. It is evident that the switch was then closed and lined up for the main track; for, if the switch had been open, that train would have gone on the sidetrack. This was about two hours before the accident happened. The next train that passed was No. 3, a fast passenger, going south. It passed Campbell's switch at 5:35, about one-half hour before the accident happened. The testimony shows that, if the switch had been open then, the passing of the train would have either broken the switch stand or have bent the switch stand or have bent the switch points, according to whether the train was running fast or slow. In addition to this, the train crew of that train testified that the switch was lined up for the main track when their train passed; and gave, as a reason therefor, that they could tell by the motion of the train whether a switch was open or closed. The switch stand was found to be in perfect condition except that the lock was broken; and its appearance indicated that it was freshly done. This makes it appear, as nearly as human testimony can establish a fact, that the switch was not left open by the employees of the company.

There can be but two theories as to the unfortunate accident. One is that the employees of the trains which passed the switch just before the occurrence are not telling the truth, and the other is that a stranger broke the lock and threw the switch for the side track.

As to the former, there is nothing to warrant the finding of the jury. The testimony of the witnesses introduced by the railroad company was uncontradicted, and was reasonable and consistent; and the jury had no right to arbitrarily disregard it. When it is given probative force, it overcomes the presumption of negligence arising from the operation of trains, established by the proof that the switch was open. Then, too, there was some evidence, however weak it may be, that the switch lock was broken and the switch opened by a stranger. We refer to the testimony of Mrs. Mattie Walton as to statement of Bill Sharp that he had broken the switch lock and set the switch for the side track, which testimony was not objected to, and was entitled to some probative force.

The evidence did not support the verdict; and the judgment will be reversed, and the cause remanded for a new trial.

WINN v. WHITEHOUSE.

Opinion delivered July 11, 1910.

1. PUBLIC LANDS—EFFECT OF LAND COMMISSIONER'S DEED.—Kirby's Digest § 4820, making deeds of forfeited lands *conclusive* evidence of title, is ineffective to give such deeds anything more than a *prima facie* effect. (Page 43.)
2. EJECTMENT—CONFLICTING PRESUMPTIONS—BURDEN OF PROOF.—Where the plaintiffs in an ejectment suit rely upon a deed executed by the Commissioner of State Lands, conveying internal improvement land, and the defendant upon a prior deed executed by such commissioner conveying forfeited land, there being a statutory presumption in favor of each deed, the plaintiffs, to succeed, must show that they have the real title. (Page 44.)
3. EVIDENCE—UNCERTIFIED COPY OF RECORDS OF LAND OFFICE.—An alleged copy from the books of the State Land Commissioner, not certified by that officer, is inadmissible in evidence. (Page 45.)
4. SAME—BURDEN OF PROOF.—The plaintiff in ejectment must recover upon the strength of his own title. (Page 46.)

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; affirmed.

E. L. Carter, for appellants.

If property of the State is erroneously assessed to an individual and sold for his delinquent taxes, the conveyance will neither pass title nor affect the rights of the State. Black on Tax Titles, 54. A forfeiture of State land for taxes is void, and one holding a donation deed based thereon acquires no title. 75 Ark. 146. And a person afterwards entering the land need not tender the purchaser at the tax sale the money paid and value of improvements made by him before suing for the land. 31 Ark. 279. The State is not bound by the unauthorized acts of its agents. 42 Ark. 118. The betterment act does not operate against the State. 57 Ark. 474.

Walker & Walker, for appellee.

The record of the Commissioner of State Lands was not admissible as evidence. The record sustains the ruling of the trial court. 74 Ark. 551; 75 Ark. 76; 78 Ark. 379; 80 Ark. 79; 81 Ark. 327; 85 Ark. 123; 88 Ark. 449; 90 Ark. 230; Kirby's Dig., § § 756 and 757.

WOOD, J. The appellee is in possession of a tract of land in Washington County, Arkansas, under a donation deed executed to him by the Commissioner of State Lands, March 5, 1903. Appellants seek to eject appellee under a deed executed by the State Land Commissioner, October 6, 1906, to the lands in controversy as "internal improvement land." Section 4820 of Kirby's Digest provides:

"The deeds of the commissioner shall be conclusive evidence in all courts of a good and valid title to the donee, his heirs and assigns, and shall be evidence that the land has been regularly forfeited by the original owner, that the State had properly donated its right thereto, and such evidence shall be received by the courts."

The donation deed under this statute is *prima facie* evidence of title in the appellee. *Cracraft v. Meyer*, 76 Ark. 456, and cases cited. To overcome this *prima facie* title of appellee, appellants must show title in themselves. They seek to do this by a deed of the State Land Commissioner to the land as internal improvement lands executed at a later date than appellee's donation deed. The deed of the State Land Commissioner to internal improvement lands is also *prima facie* evidence of title. Section 2741, Kirby's Digest. (Act of January 10, 1857.)

The Legislature had no power to make either the donation deed or the deed to internal improvement lands conclusive evidence of title. *Cairo & F. Rd. Co. v. Parks*, 32 Ark. 145. Deeds under these respective statutes are but *prima facie* evidence of title. *Cairo & F. Rd. Co. v. Parks*, *supra*; *Cracraft v. Meyer*, *supra*.

Appellants could not succeed in overcoming appellee's *prima facie* title by simply showing a later *prima facie* title, that was of no greater probative force or significance than appellee's *prima facie* title. As *prima facie* evidence, appellee's deed had as much evidentiary importance as did that of appellants. Between these conflicting presumptions of equal statutory dignity and probative power, the one who has the burden must fail unless he brings forward proof to overcome the presumption that stands in the way of his contention. The presumptions stand in equilibrium, so to speak, and appellants could only "turn the scale" in their favor by proof. Therefore, appellee being in possession under a *prima facie* title, appellants, if they succeed in ousting him, must overcome his *prima facie* title by showing, not that they also have *prima facie* title, but that they have more than this, *i. e.*, the real title. Appellants have not done this. They set up in their complaint that they derive title to the land in controversy as follows:

"By an act of Congress to appropriate the proceeds of the sale of public lands approved March 3, 1847, the above described lands, together with others, were granted to the State of Arkansas, to aid in the construction of improvements within said State.

"In conformity with said act, the United States Government conveyed the said lands to the State of Arkansas on June 23, 1836, said conveyance being confirmed on March 3, 1847, as will appear by the certificate of the register of the United States Land Office at Harrison, Arkansas, attached hereto as an exhibit and recorded in record book 114, page 405.

"That, under a provision of an act of the General Assembly regulating the price and sale of said land so granted by the United States to it, the plaintiff paid into the treasury the purchase price of the land and received the State's patent, which has been recorded in the records of Washington County."

Appellants offered what purported to be a transcript of a portion of page 58 of the record of "Internal Improvement Confirmation—State of Arkansas," showing that the lands in controversy had been duly selected and approved as Internal Improvement lands. But this alleged transcript of a portion of page 58 was not duly authenticated. There was no certificate of the Commissioner of State Lands attached thereto, showing that it was a true and correct transcript of the record.

The bill of exceptions recites that: "The plaintiffs offered to introduce the transcript from the record of the Commissioner of State Lands at Little Rock, to which the defendant objected on the ground that the transcript was irregular, and that it was not attached to the certificate of the land commissioner. The objections of the defendant were sustained, and the plaintiffs asked that their exceptions to the court's ruling be made a matter of record."

The court ruled correctly in excluding this evidence. The purported transcript and the certificate of the commissioner were not attached, and there was no testimony before the court to show that the purported transcript was the page of the record referred to by the commissioner in his certificate. The alleged transcript of the "page 58" had no certificate of the commissioner attached to it showing that it was the record. There was no evidence to show that the certificate of the commissioner contained on another and separate page referred to the identical alleged transcript of page 58 that was offered in evidence. The pages were detached and separate pieces of paper, and the court had no means of identifying the alleged transcript of the record of page 58 as the one referred to by the commissioner in his certificate. There was no offer even to show that these separate pages were ever attached, and that by accident or otherwise they had been detached. There was no offer even to show that they had been received in the same letter. Authentication of records can not be made in such a loose and indefinite manner. Sections 882, 891 and 2469, Rev. Stat. U. S.; page 183, Kirby's Digest. The papers brought here by subpoena duces tecum showing the original papers that were offered in evidence do not disclose that the certificate of the commissioner was ever attached to the purported transcript of the portion of page 58 of the record of

"Internal Improvement Confirmation—State of Arkansas." Appellants therefore failed to prove that the lands in controversy were "Internal Improvement" lands. This they had to do in order to overturn appellee's donation deed.

The court erred in excluding the deed of the Commissioner of State Lands to appellants Winn, Deibel and Diebel, for the statute section 2741, Kirby's Digest, as we have stated, makes the patent certificates (and of course the patent itself) evidence of title. But this error could not prejudice appellants, for, as we have shown, the deed was only *prima facie* evidence, and not sufficient to overturn appellee's possession under his *prima facie* title.

The burden was on appellants to recover on the strength of their own title and to show a better title than appellee. *Beardsley v. Hill*, 77 Ark. 244; *Allen v. Phillips*, 87 Ark. 185.

This they have failed to do. The judgment was therefore correct, and is affirmed.

UNITED WALNUT COMPANY v. COURTNEY.

Opinion delivered July 11, 1910.

STATUTE OF FRAUDS—PROMISE TO PAY ANOTHER'S DEBT.—Where an oral promise is made to pay the debt of another out of property placed in the hands of the promisor for that purpose, it is an original promise, and not governed by the statute.

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon*, Judge; affirmed.

STATEMENT BY THE COURT.

The plaintiff (appellee) sued the defendant (appellant), alleging that in 1906 he sold a certain lumber business, saw mill, lumber, timber and logs, at Quinton, Oklahoma (then Indian Territory), to William Knowlton, who agreed to pay therefor the sum of \$1,030, evidenced by note and contract; that immediately after said transaction plaintiff entered into an agreement with the United Walnut Company (defendant), whereby the note and contract were made payable to defendant, and de-

fendant thereupon paid plaintiff the sum of \$500 upon said note and contract, and agreed to pay plaintiff the balance of \$530; that it was agreed between this plaintiff and this defendant that the said debt owed by Knowlton to this plaintiff, which was evidenced by contract and note made payable to defendant, should be paid by shipments of lumber from Knowlton to United Walnut Company, and that after the first car was shipped all other shipments should be applied by the defendant upon the indebtedness due plaintiff, at the following prices (here the prices are set out). It was agreed between this plaintiff and the defendant that as fast as said shipments were made they should be applied to this \$1,030 indebtedness, and upon no other indebtedness, until said amount was paid in full. That subsequent to that time William Knowlton in compliance with his contract shipped to this defendant lumber at the above named prices to an amount largely in excess of \$1,030, in excess of that amount. That this defendant has retained the proceeds of said lumber, and has refused to pay the \$530 now due this plaintiff, and still so refuses. That demand has been made upon this defendant for payment of said sum, and that defendant has wholly failed to pay. Judgment was prayed in the sum of \$530.

The defendant in its answer denied all the material allegations of the complaint, and then set up the following: "that no note or memorandum in writing signed by them, or by any one for them properly authorized, was ever made, binding them to pay this plaintiff the debt which he alleges the said William Knowlton owed him, nor is there any note or memorandum in writing signed by them, or by any one for them properly authorized, binding them to plaintiff in the contract he has alleged in his complaint. Wherefore these defendants plead and rely upon the statute of frauds of the State of Arkansas in such cases made and provided."

"Further answering, these defendants say that on November 30, 1906, at the request of William Knowlton and the plaintiff Courtney, they advanced the sum of \$500, which at his request was paid to the plaintiff Courtney; the said advance being made upon a lot of lumber then stacked upon the mill yard of Knowlton near Quinton, Oklahoma; that at time said money was advanced defendants agreed with said plaintiff that they would

retain for him whatever sum said lumber was worth over and above the said \$500 advanced, and the necessary expense of marketing same. That when said lumber was brought into defendants' yard at Fort Smith, Arkansas, after paying the charges of hauling and loading same and the freight from Quinton to Fort Smith, defendants got only \$469.97 out of it. That at the time defendants advanced the \$500 aforesaid upon said lumber, at the request as above alleged of the said Knowlton and the plaintiff Courtney, the said Courtney promised these defendants to repay the said loan to them if they did not get it out of said lumber. Wherefore defendants ask judgment against Courtney for \$30.00."

There was testimony on behalf of appellee tending to prove that it entered upon a contract with appellant as alleged in his complaint and tending to establish appellee's claim. There was evidence on behalf of appellant tending to prove that the only contract it had with appellee was that set up in its answer. There was evidence on behalf of appellant also tending to prove that Knowlton was indebted to appellant, after having given him credit for all the lumber he had shipped to appellant, in the sum of \$688.75.

The court gave instructions on its own motion submitting to the jury to determine whether or not the contract existed between appellee and appellant as contended by appellee, or whether the contract between them was as contended by appellant. Appellant duly excepted to the ruling of the court in giving these instructions.

The court at the request of appellant gave the following:

"No. 1. If you find from the evidence that the contract between plaintiff and defendant was that plaintiff borrowed of defendant five hundred dollars and secured same by an agreement to ship him a certain lot of lumber in stacks at his mill near Quinton, Oklahoma, and further agreed that if defendant did not get the five hundred dollars out of said lumber he would repay the same; and you further find that it was also agreed as a part of the same transaction that if, when said lumber was delivered to defendant and it brought more at the prices agreed upon than the five hundred dollars so advanced, said excess over five hundred dollars should be paid to the plaintiff; and you further find that when said lumber was delivered to defendants

it did not bring at the prices agreed upon a sum in excess of five hundred dollars, your verdict must be for the defendant."

The court refused the following prayers of appellant:

2. If you find from the evidence that defendant advanced the sum of five hundred dollars to Wm. Knowlton, and paid the same to Courtney, the plaintiff, upon an indebtedness of said Knowlton to Courtney, and you further find that said money was advanced upon certain lumber stacked at Knowlton's mill near Quinton, Oklahoma, and that defendants advanced said money upon said lumber at the request of said Courtney, and you further find that when said lumber was shipped it did not produce enough money to pay said advance of five hundred dollars, your verdict must be for the defendants.

"3. The plaintiff alleges that the defendants owe him five hundred and thirty dollars, which he says it agreed to pay him upon an indebtedness that one Wm. Knowlton owed him. The defendants deny that they promised to pay plaintiff the sum of five hundred dollars that Wm. Knowlton owed him, and plead that there is no promise in writing made by it to pay said debt. Now, you are instructed upon this point that defendants cannot be held liable for the debt of Knowlton to plaintiff, even if you find they did promise to pay the debt, unless you further find that said promise was made in writing and signed by defendants, or by some one for them having authority to sign their name."

Appellant duly excepted to the ruling of the court in refusing the above prayers.

There was a verdict in favor of appellee for \$530. Judgment was entered according to the verdict, and appellant duly prosecutes this appeal.

Winchester & Martin, for appellant.

Every collateral undertaking or promise to answer for the debt, default, or miscarriage of another, is within the statute of frauds, and void if not in writing. 12 Ark. 174; 31 Ark. 613; 21 N. Y. 412; 31 Am. Rep. 476; 50 Am. Rep. 693.

Hill, Brizzolara & Fitzhugh, for appellee.

When, in consideration of a promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the statute of frauds, and plaintiff

may recover. 37 Am. Rep. 612; 4 Cow. 432; 31 Ark. 613; 45 Ark. 67; 75 N. Y. 445; 98 N. Y. 206.

WOOD, J., (after stating the facts). There was ample evidence to sustain the verdict that appellant had entered into a contract with appellee as alleged in the complaint. Appellant contends that there was no evidence to support the verdict as to the amount due appellee, basing its contention on the ground that, according to the testimony of appellant's bookkeeper and a statement prepared by him from tally sheets, books and papers of appellant, Knowlton was indebted to appellant after charging him with the sums paid him on lumber and giving him credit for the full purchase price of the lumber in the sum of \$688.75. But the testimony of the bookkeeper himself shows that several errors were made in entries on the books. The jury were warranted in not treating the statement prepared by appellant's bookkeeper from the books and papers of appellant showing Knowlton was indebted to appellant in the sum of \$688.75 as conclusive evidence of the fact. On the other hand, there is testimony in the record tending to prove that appellant received of Knowlton under the contract between appellant and appellee 18 cars of lumber. The first two cars contained 31,870 feet, which netted appellee, and for which he received credit, \$469.97. This left sixteen cars to be accounted for.

There is some dispute in the evidence as to whether appellant received 17 or 18 cars from Knowlton. But, even if only seventeen cars were received by appellant, the testimony shows that, after deducting the credit for the two cars which appellee received, there remained 173,338 feet. The average price of the lumber according to prices to be paid for the different grades would be over \$25 per thousand. At \$25 per thousand the total amount for the lumber would be \$4,333.45. There was evidence tending to prove, and the jury might have found, that appellant advanced to Knowlton on the above lumber the sum of \$17 per thousand. This would have left ample margin for the payment of the balance due on the note of \$1,030, which, under the contract between appellant and appellee, was to be paid to appellee until the note was paid. There was testimony on behalf of appellant tending to prove that it had paid Knowlton, not only the \$17 per thousand advance, but the full purchase price for the lumber. But, on the other hand, there was testimony

on behalf of appellee tending to prove that the advance of \$17 per thousand was all that Knowlton received, that the payments that were made to him were part of this advancement at \$17 per thousand. After considering all the testimony in the record, we can not say that the evidence conclusively proves that appellant was not indebted to appellee in the amount of the verdict. Under all the evidence in the record, it was a question for the jury.

We have noted carefully the criticism of appellant upon the instructions given by the court on its own motion. We find no reversible error in these instructions. They fully and fairly submitted the issues raised by the pleadings, and we think correctly presented the respective contentions which the evidence tended to establish. The legal principles involved we do not deem of sufficient general importance to warrant setting out and discussing the instructions in detail. The instructions in fact did not announce any principle of law, but were simply a submission of the respective contentions of the parties on the evidence adduced by them, leaving the jury to determine which was correct.

The court did not err in refusing appellant's prayer number 2, for this was fully covered by prayer number 1 of appellant, which the court granted.

There was ^{an} error in refusing appellant's prayer number 3. Conceding, as we must, since the jury has so found, that there was such a contract between appellant and appellee as set up in the complaint, such contract, as we construe it, was in no sense collateral, but an original undertaking upon the part of appellant with appellee. The contract was based upon a sufficient, indeed a valuable, consideration, for appellee was once the owner of the mill which he had then sold to Knowlton. Appellant wanted the lumber product of that mill, and agreed with appellee that, if the lumber from that mill was shipped to it, it would see that the purchase price of the lumber was paid to appellee until the note which was given by Knowlton to pay for the mill was paid. Appellant did not own the mill, but it agreed that the note, representing the purchase price of the mill which was due to appellee, should be given to it. Appellant took the note, and received the shipments of lumber under the express contract that the purchase price for the lumber should

be applied to the payment of the note. This was the contract from appellee's viewpoint. The lumber product of the mill was thus placed in the hands of appellant by appellees to be devoted to the payment of the note, the amount of which was due to appellee. Appellee perfected the arrangement by which this was done. Appellant got the benefit of it. The facts bring the case within the principle stated in *Mason v. Wilson*, 37 Am. Rep. 612, as follows: "When, in consideration of a promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against, and the plaintiff may recover on the promise or under an action for money had and received." Smith on Law of Fraud, § 318; Browne on Stat. of Frauds, § 169; also § 187; *Farley v. Cleveland*, 4 Cowen, 432, and cases reviewed therein; 29 Am. & Eng. Ency. L., (2 ed.) 917. See also *Hughes v. Lawson*, 31 Ark. 613, *Chapline v. Atkinson*, 45 Ark. 67, where the principle is not expressly stated, but recognized.

The statute of frauds has no place in the case. The judgment is correct.

Affirmed.

CLARDY v. STATE.

Opinion delivered October 3, 1910.

1. ASSAULT WITH INTENT TO KILL—CONSTITUENTS OF OFFENSE.—To constitute the crime of assault with intent to kill, the evidence must show that the assault was made with the specific intent to kill and not accidentally, and that it was made with malice and not as a result of a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, so that if death had ensued the crime would have been murder, either in the first or second degree. (Page 55.)
2. SAME—WHEN MALICE IMPLIED.—Malice will be implied where there is a homicide with a deadly weapon, and no circumstances of mitigation, justification or excuse appear. (Page 55.)
3. HOMICIDE—EFFECT OF PASSION.—The passion which will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment or of fear or terror; but there must also be a

provocation which induced the passion and which the law deems adequate to make the passion irresistible. (Page 55.)

4. **ASSAULT WITH INTENT TO KILL—PROVOCATION.**—While an assault is not necessarily a sufficient provocation to reduce a homicide from murder to manslaughter, an assault with violence upon another who acts under the influence thereof may be sufficient. (Page 55.)
5. **HOMICIDE—PROVOCATION.**—Mere words or conduct, however insulting or offensive, are insufficient to reduce a homicide to manslaughter, though the homicide was committed in a passion provoked by them. (Page 55.)
6. **ASSAULT WITH INTENT TO KILL—EVIDENCE.**—Evidence tending to prove that defendant was armed with a deadly weapon, that the prosecuting witness sent for an officer to arrest him for that offense, that he followed defendant to keep watch on him, and was unarmed, and that defendant shot at him when he was making no demonstration to do defendant any violence or injury, is sufficient to sustain a conviction of assault with intent to kill. (Page 56.)
7. **EVIDENCE—MANNER OF OBJECTION.**—The proper manner to make objection to testimony is to object to the testimony at the time the testimony is offered, or to ask for its exclusion at the time it is given, and then except to an adverse ruling. (Page 56.)
8. **SAME—SUFFICIENCY OF OBJECTION.**—A motion to exclude all of the testimony of a witness was properly overruled if a part of it is competent. (Page 57.)
9. **INSTRUCTIONS—NECESSITY OF OBJECTION.**—Where no objection was made to the court's instructions in the lower court, none can be made in this court. (Page 57.)

Appeal from Sebastian Circuit Court, Fort Smith District;

J. S. Maples, Judge on Exchange; affirmed.

Edwin Hiner, for appellant.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

1. In order to avail himself here of any objection to testimony introduced at the trial, appellant must not only have objected to the testimony when offered or given, but also have obtained a ruling thereon and saved his exceptions. 72 Ark. 371; 73 Ark. 407; 65 Ark. 107; 76 Ark. 276; 36 Ark. 635; 52 Ark. 180; 74 Ark. 256.

2. This court will not review instructions given at the trial, unless the appellant at the time objected thereto, saved his exceptions, and incorporated such exceptions in his motion for new trial. 26 Ark. 234; 41 Ark. 545; 91 Ark. 43; 75 Ark. 534; 88 Ark. 505; 43 Ark. 391; 62 Ark. 543.

3. Where the bill of exceptions does not purport to contain all of the testimony introduced at the trial, this court will presume that the verdict is supported by the testimony. 17 Ark. 327; 72 Ark. 185; 37 Ark. 57. And where it does not show affirmatively or inferentially that it contains all of the testimony, the lower court's rulings thereon will be presumed to be correct. 74 Ark. 551.

FRAUENTHAL, J. The defendant, Will Clardy, was convicted of the crime of assault with intent to kill, and upon this appeal urges that the judgment of conviction should be reversed for the following reasons: (1) Because there was not sufficient evidence to sustain the verdict of the jury; (2) because the lower court committed error in permitting the introduction of certain testimony; and (3), because the court erred in giving certain instructions.

Briefly stated, the evidence on the part of the State established the following case. Adolph Wunch, the person whom it is alleged in the indictment the defendant assaulted, in company with some other white boys, had entered a lunching house in the city of Fort Smith, and had invited his companions to eat with him at the lunch counter. Shortly thereafter the defendant came into the house and pushed in between these white boys at the lunch counter, and thereupon some angry words passed between Wunch and the defendant. The defendant pulled out a pistol, and went out on the pavement, and Wunch followed, and stated that defendant had a pistol, and requested that some one should go for an officer. In a few minutes the defendant went into a saloon adjoining the building, and Wunch followed him with the intention, as he claimed, to keep watch of him. The interior of the saloon was divided by a partition, and the defendant passed into the rear room. Wunch thereupon passed around the partition when the defendant shot at him with a pistol. During the entire time Wunch was unarmed; and at the time the defendant shot at him he was some short distance from the defendant, and made no effort or demonstration to assault or injure him.

The defendant testified that when he was in the lunching house Wunch said to him: "Nigger, what are you doing in here?" and that he asked Wunch why he was "tying into him," and that he put his hand into his pocket and told the parties

to stand aside until he passed out. After he got in the rear room of the saloon he heard some one running through the saloon towards the rear where he was, and that he then pulled his pistol; that immediately afterwards Wunch and the other parties came behind the partition and demanded that he throw up his hands; that he was frightened, and as he started to throw up his hands he accidentally pulled the trigger of the pistol, and the shot was fired.

In order to constitute the crime of assault with intent to kill, the evidence must show that the assault was made with the specific intent to kill the person whom the indictment charges was thus assaulted, and also malice, either express or implied. These two ingredients, specific intent to kill and malice, are the essential constituents of this crime, and both must be established by evidence before a jury can be warranted in returning a verdict of guilty of assault with intent to kill. It is essential to prove that the assault was made with the intent to kill and not accidentally; and that it was made with malice and not as a result of a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, so that if death had ensued the crime would have been murder, either in the first or second degree. *McCoy v. State*, 8 Ark. 451; *Cole v. State*, 10 Ark. 318; *Lacefield v. State*, 34 Ark. 375; *Beavers v. State*, 54 Ark. 335; *Davis v. State*, 72 Ark. 569; *Satterwhite v. State*, 82 Ark. 64.

The law will imply malice where there is a homicide with a deadly weapon and no circumstances of mitigation, justification or excuse appear; and proof of a homicide under such circumstances will warrant a conviction of murder in the second degree. The passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible. An assault with violence upon another who acts under the influence thereof may be sufficient to arouse such passion; but every assault is not necessarily a sufficient provocation to mitigate the crime from murder to manslaughter; and

words or conduct, however insulting or offensive, are not adequate to reduce the crime to manslaughter, although the homicide was committed in a passion provoked by them; and mere threats or menaces, where the person killed was unarmed and neither committing nor attempting to commit violence on the defendant at the time of the killing, will not free him of the guilt of murder. *Stanton v. State*, 13 Ark. 317; *Green v. State*, 45 Ark. 281; *Petty v. State*, 76 Ark. 515; *Allison v. State*, 86 Ark. 444; Wharton on Homicide, 276; 2 Bishop, New Criminal Law, § § 697, 702.

In the present case the defendant was not, under the testimony introduced on behalf of the State, justified in firing the pistol at Wunch, for under that testimony he was not in such immediate danger as to make that action necessary, nor had he employed all the means within his power and consistent with his safety to avoid the necessity of such act.

The testimony on the part of the State tended to prove that the defendant fired the shot with the intent to kill Wunch, and under circumstances which were not sufficient to arouse in him the passion of anger or fear beyond the power of self-control. This testimony tended to prove that the defendant was armed with a deadly weapon, and that Wunch sent for an officer to arrest him for that offense; that he followed defendant to keep watch on him so as to notify the officer when he arrived; that he was unarmed, and that defendant shot at him when he was making no demonstration or offer to do him any violence or injury. The defendant testified that he fired the shot accidentally and without the intent to kill any one. That was a question of fact which, under the testimony and circumstances of this case, it was peculiarly the province of the jury to pass on and determine. Upon a consideration of all the testimony we are of the opinion that there was some substantial evidence which warranted the jury in finding that each ingredient of this crime was established.

It is urged that the lower court committed an error in overruling the defendant's objection to the testimony given by Frank Green. This witness was introduced by the State, and among other things testified that a few minutes before the defendant fired the shot at Wunch he was at the rear of a

saloon located on the opposite side of the street from which the shot was fired, and that the defendant there displayed a pistol. He also testified that the defendant said to him that "he wanted him to come out, that he wanted to give him some of this," at the time displaying the pistol. No objection was made to any question that was propounded to this witness at the time it was asked; nor was any motion or request made at such time to exclude the answer to same, but, after the witness had completed giving his entire testimony, it is stated in the bill of exceptions, that "to all of the testimony given by Frank Green the defendant at the time excepted and asked that his exceptions be noted of record." The proper manner in which to make and preserve an objection to the introduction of testimony is, first, to make the objection at the time the testimony is offered or to ask its exclusion at the time it is given and to obtain a ruling of the court thereon, and then to except to an adverse ruling. *Mize v. State*, 36 Ark. 653; *Fort v. State*, 52 Ark. 180; *Meisenheimer v. State*, 73 Ark. 407; *Kansas City So. Ry. Co. v. Murphy*, 74 Ark. 256. But, if we shall consider that the exception to the testimony was in effect an objection made thereto and an exception to the overruling of such objection, still we do not think that error was committed by the lower court in this ruling. The defendant did not make any specific objection to any of the testimony when it was offered, nor did he ask for the exclusion of any specific part of it after it was given. *Vaughan v. State*, 58 Ark. 353; *Marey v. State*, 76 Ark. 276. He objected generally to all of the testimony. Now, all of the testimony was not incompetent. It was clearly competent to show by this witness that a few minutes before the shot was fired the defendant was armed with a pistol. A motion to exclude all the testimony of a witness is properly overruled if a part of it is competent. *Central Coal & Coke Co. v. Niemeyer Lumber Co.*, 65 Ark. 106; *Mallory v. Bradmeyer*, 76 Ark. 538; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 87 Ark. 331; *Nichols v. State*, 92 Ark. 421; *Powell v. State*, 74 Ark. 355.

It is urged that the lower court erred in giving certain instructions to the jury. The court instructed the jury fully upon every ingredient that was essential to constitute this crime

and upon every charge that was embraced in the indictment; and it is not claimed that the court refused to give any instruction that was asked. The complaint now made is relative to the verbiage of some of the instructions. But the defendant did not make any objection to any of these instructions at the time that they were given; he did not ask for a ruling of the lower court upon any objection thereto, and he made and saved no exception to any ruling thereon. This court only determines whether or not the lower court has made an error in any of its rulings. There must therefore be a decision by the lower court upon the question raised; and, in order to obtain such decision of the lower court, an objection must be made, and a ruling of the lower court upon such objection obtained. If no objection is made in the lower court to the instructions, it cannot be made in this court. *McKenzie v. State*, 26 Ark. 334; *Johnson v. State*, 41 Ark. 535; *Hamilton v. State*, 62 Ark. 543; *St. Louis & S. F. Rd. Co. v. Fayetteville*, 75 Ark. 534; *Com. Fire Ins. Co. v. Belk*, 88 Ark. 505; *Harding v. State*, 94 Ark. 65.

Finding no prejudicial error in the trial of this case, the judgment is affirmed.

ROBERTS v. STATE.

Opinion delivered October 3, 1910.

1. ACCOMPLICE—CORROBORATION.—An accomplice testifying in a murder case may be corroborated by proof that defendant entertained ill will towards the deceased and had threatened to kill him. (Page 61.)
2. APPEAL AND ERROR—WHEN OBJECTION TO EVIDENCE WAIVED.—Where defendant objected to parol proof of a matter of record, whereupon the prosecuting attorney said: "I will ask the clerk to bring up the record," which was not done, and defendant did not ask the court to rule upon the evidence or to exclude it, he will be held to have waived his objection. (Page 61.)
3. ACCESSORY—CONVICTION AS PRINCIPAL.—One who advises or encourages the commission of a crime, but is not present when it is committed, can not be convicted under an indictment charging him with being a principal. (Page 62.)
4. HOMICIDE—INDICTMENT AS ACCESSORY—VERDICT.—Where the indict-

ment charged that defendant was an accessory before the fact to a murder, and the proof was directed to and sustained that charge, a verdict of guilty of murder in the second degree will be upheld if it is manifest that the jury intended to convict the defendant under the charge. (Page 62.)

5. **SAME—HARMLESS ERROR.**—One convicted of murder in the second degree cannot complain because the proof showed that he was guilty of murder in the first degree. (Page 62.)

Appeal from Cross Circuit Court; *Frank Smith*, Judge; affirmed.

Smith & Smith and *S. R. Simpson*, for appellant.

1. Taylor and Robinson were accomplices. The testimony of one accomplice cannot be used to corroborate the testimony of the other.

2. It was error to admit testimony to show that appellant had been convicted of another offense. It was inadmissible. 67 Ark. 112; 65 Ark. 278; 66 Ark. 494; 68 Ark. 606; 76 Ark. 302. Proof of other crimes is always to be excluded unless it is necessary to show a motive for the offense charged, or where the offense charged is a series of acts all of which are criminal. 21 Cyc. 899; 91 Ark. 555.

3. Where it was admitted that ill-feeling existed between the appellant and the deceased, it was improper to go into the details of their differences; and it was error for the court to state, in overruling objections to such testimony, that appellant was to blame for their troubles. Art. 7, § 23, Const.; 85 Ark. 139; 45 Ark. 165; 83 Ark. 195; 45 Ark. 492; 49 Ark. 439; 52 Ark. 263; 36 Ark. 117; 59 Ark. 417; 73 Ark. 568; 54 Ark. 489; 77 Ark. 419; 70 Ark. 420.

4. The verdict is not responsive to the indictment. Kirby's Digest, § 1565; *Id.* § § 2413, 2414; 54 Ark. 664; 45 Ark. 470; 38 Ark. 550; 50 Ark. 28; 57 Ark. 560; 15 Ark. 204; 19 Ark. 213; 37 Ark. 274; 41 Ark. 173; 42 Ark. 380; 55 Ark. 593; 75 Ark. 513; Kirby's Digest, § 1560; 83 Ark. 229; 84 Ark. 606.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

1. There is affirmative proof that Robinson was not an accomplice, and the jury's finding under proper instructions of the court settles that question. His testimony sufficiently cor-

roborates Taylor. 33 Ark. 196; 46 Ark. 141; 126 S. W. 843. If, through fear for his own safety, he passively concealed the real criminal, he did not thereby become an accomplice. 43 Ark. 371; 45 Ark. 539; 51 Ark. 115; 96 Ark. 7.

2. For the purpose of showing motive for the commission of the offense charged, proof of other acts, though criminal, is admissible. 87 Ark. 17; 84 Ark. 119; 75 Ark. 427.

3. The indictment, embodying two counts, did not charge separate offenses, but only two modes in which the same offense could be committed. No election could be required; and, since an accessory before the fact is, for the purpose of punishment, a principal under the statute, the testimony in this case supports the verdict of murder in the second degree. Kirby's Digest, § 2230; 42 Ark. 105; 58 Ark. 390; 59 Ark. 422; 50 Ark. 305; 21 Cyc. 683; 45 S. W. 592; 13 Tex. 168; 43 Fla. 194; 68 Mo. 408.

McCULLOCH, C. J. Appellant, George Roberts, was indicted by the grand jury of Cross County, the count upon which he was convicted accusing him of the crime of accessory before the fact to the murder of one J. S. Bene, one Wes Taylor being named in the indictment as principal. No objection has been raised as to the form of the indictment. The jury returned a verdict finding appellant guilty of murder in the second degree, and fixing his punishment at confinement in the penitentiary for a term of ten years.

The crime was one of shocking atrocity. The appellant and deceased, Bene, were rival merchants at the village of Wittsburg on the St. Francis River. They were the only merchants there, both having small stocks of merchandise. Bene had been in business there about two years, and appellant opened a store less than a year before the tragedy occurred. Ill feeling grew up between them on account of charges made by Bene against appellant of unlawful sales of intoxicants. The latter was prosecuted in the courts, and about two months before the tragedy they shot at each other from their respective stores, which were on opposite sides of the road, but neither of them received any injury in this encounter.

Bene was secretly shot and killed in his store, and his body was found the next morning seated in a rocking chair. There were several buckshot wounds in his head, and several

of the shot went through the stovepipe above the body, indicating that he was shot while standing up. The store door was standing open the next morning. Two negroes, Taylor and Robinson, were arrested, as well as appellant, and accused of committing the crime. Taylor confessed, and at the trial of the case testified that he shot Bene from the front of the store, and that the appellant hired him to do it, and furnished the gun and some whisky. Robinson testified that a short time before the killing appellant asked him to kill Bene, but he declined, stating that he did not have the nerve to do it. He also testified that shortly afterwards, when appellant was indicted on the testimony of Bene for selling liquor, appellant said to him, "If you had done what I told you to do, it would not have happened." The State introduced other testimony tending to show ill will on the part of appellant toward deceased. George Stone, a farmer, testified that shortly before the killing he was hauling wood for Bene, and appellant said to him, referring to Bene, "He has as much wood as he needs. When I get through with him over yonder, he won't sell any more goods up there after court." N. A. Shumake testified that a few days after the killing appellant said to him, referring to the killing, "That is the *contents* of that court," meaning the result of the recent trial in the court when appellant was convicted of selling liquor.

It is insisted that the testimony is insufficient to support the verdict of conviction; that Taylor and Robinson were both accomplices, and that there is not sufficient corroboration of their testimony to support the verdict of conviction. It is not conclusively shown that Robinson was an accomplice. This question was submitted to the jury under proper instructions; and if the jury found that he was not an accomplice, then his testimony is sufficient corroboration of Taylor's testimony. Besides that, we are of the opinion that, even if Robinson was an accomplice, there is other testimony in corroboration sufficient to sustain the conviction. Proof of ill will and threats is sufficient for that purpose.

Error of the court is assigned in permitting the court stenographer to testify that appellant was convicted of selling whisky on the testimony of Bene. The record does not bear

out this assignment. The witness was asked whether or not appellant was convicted, and he replied in the affirmative. Appellant's counsel interposed an objection, on the ground that a judgment could not be proved by oral testimony, and also that it was not competent proof at all. The prosecuting attorney, without pressing the matter further, replied, "Then I will ask the clerk to bring up the record, so as to meet your objection." This was not done, and no ruling of the court was asked or given on the question of the admissibility of the answer of the witness. Neither was there any request made to have the statement of the witness excluded. The above-quoted remark of the prosecuting attorney ended the matter, and appellant, by acquiescing without asking for a ruling or for the exclusion of what the witness had said, waived his objection and cannot complain now.

It is next contended that the verdict of murder in the second degree is not responsive to the indictment, and should be set aside. The statute defines an accessory before the fact to be one "who stands by, aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime." Kirby's Digest, § 1560. It also provides that "he who thus aids, assists, abets, advises or encourages shall be deemed in law a principal, and be punished accordingly." Kirby's Digest, § 1561. One who advises or encourages the commission of a crime, but is not present when it is committed, cannot be convicted under an indictment charging him with being principal. *Smith v. State*, 37 Ark. 274. The indictment in the present case charges appellant as accessory, and the proof was directed to and sustains that charge. Taking the whole record together, it is manifest that the jury intended to convict the appellant under that charge. *Blackshare v. State*, 94 Ark. 548.

The fact that the conviction was for accessory to murder in the second degree, when according to the proof it should have been for the higher grade of murder, does not vitiate the verdict. *Benton v. State*, 78 Ark. 284.

There are other assignments of error, which we have examined and find to be without merit. We think appellant was fairly tried and justly convicted, so the judgment is affirmed.

RHOADES v. STATE.

Opinion delivered October 3, 1910.

- 1 FISH AND GAME—VARIANCE BETWEEN INDICTMENT AND PROOF.—Where the indictment charged that defendants were guilty of unlawful fishing, committed by fishing with a trammel net, and the proof tended to show that they fished with a hoop or barrel net, the variance is fatal. (Page 64.)
2. SAME—RIGHT TO FISH WITH HOOP OR BARREL NET.—Under Kirby's Digest, § 3600, making it unlawful to place, erect or maintain "any seine net, gill net, trammel net, set net, bag weir, bush drag, any fish trap or dam, or any other device or obstruction, or by any such means to take or catch any fish in the waters of this State," it is unlawful to fish in any of the waters of this State with a hoop or barrel net. (Page 64.)

Appeal from Monroe Circuit Court; *Eugene Lankford*, Judge; reversed.

Manning & Emerson, for appellant.

1. Where the indictment charges the defendant with taking fish with a trammel net, and the proof shows that they fished with a hoop or barrel net, there is such a variance as will not sustain a conviction. 14 N. E. 643; 13 Ark. 62; 29 Ark. 299; 34 Ark. 160; 60 Ark. 141; 61 Ark. 115; 62 Ark. 516; 55 Ark. 389; *Id.* 242; 26 Fed. Cas. 15,403; 17 Am. Rep. 40; 19 Ill. 74; 90 Ky. 637; 8 So. 624; 16 Pac. 417; 23 S. E. 619; 105 S. W. 200; 82 N. E. 226; 126 S. W. 598; 22 Cyc. 456.

2. Under the statute, fishing with a hoop or barrel net is not an offense. The clause "or any other device or obstruction" does not include such nets. 73 Ark. 600.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

1. Trammel nets and hoop or barrel nets are of the same general character, in that they catch and hold the fish in the same way, *i. e.*, by entangling them in their meshes. Webster's Dict., Trammel. The variance between the indictment and the proof, if any, is technical merely, and not material. 13 Ark. 703; 34 Ark. 441.

2. The statute fully covers fishing with hoop or barrel nets. 172 Ill. 40.

HART, J. The indictment in this case charges M. S. Rhoades and M. M. May with the crime of unlawful fishing, committed by catching fish "with a trammel net in the waters of White River, in Monroe County."

The proof showed that Rhoades and May did not fish with a trammel net, but that they used a hoop or barrel net. The indictment was returned under section 3600 of Kirby's Digest, which, as far as material to the present case, is as follows:

"No person shall be allowed to place, erect, or cause to be placed or erected, or maintained in any of the waters of this State, or in front of the mouth of any stream, slough or bayou, any seine net, gill net, trammel net, set net, bag weir, bush drag, any fish trap or dam, or any other device or obstruction, or by any such means to take or catch any fish in the waters of this State."

The court instructed the jury that if Rhoades and May fished with a hoop or barrel net within the time and at the place mentioned in the indictment they would be guilty as charged.

From a judgment of conviction Rhoades and May have duly prosecuted an appeal to this court.

The principal ground relied upon for a reversal of the judgment is that there is a variance between the indictment and the proof in the case. The indictment having charged that there was a violation of section 3600 of Kirby's Digest by fishing with a trammel net, this became a part of the description of the offense, and should have been proved as alleged. This was not done, and for that reason the judgment must be reversed. See *Marshall v. State*, 71 Ark. 415, and cases cited. A hoop or barrel net as shown by the evidence is a net, but it is not a trammel net. Greenleaf lays down the rule as follows:

"Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity." 1 Greenleaf, Ev. (16 ed.), § 65, p. 829; 22 Cyc., p. 370.

It is again contended by counsel for appellant that the statute in question does not make it an offense to fish in the navi-

gable waters of this State with a hoop or barrel net. It is true that these specific nets are not named in the statute, but they are of the same general kind as the net named, and are used for the same purpose. We are of the opinion that they fall within the meaning of the clause, "or any other device or obstruction."

The judgment will be reversed and the cause remanded for a new trial.

DODGE v. STATE NATIONAL BANK.

Opinion delivered July 14, 1910.

1. **INSURANCE—CONSPIRACY TO SECURE STATE LICENSE—LIABILITY.**—It appears that if a bank conspires with an insurance company to represent falsely to the Auditor of State that the insurance company has on deposit with the bank the sum of \$50,000 for the purpose of inducing the Auditor to grant a license to the insurance company to transact business in the State, and the Auditor, upon such representation, grants the insurance company license, in a suit by the Auditor under Kirby's Digest, § 4430, subdiv. 8, or in a suit by a receiver of the insurance company under Kirby's Digest, § § 950, 954, the bank will be estopped by its conduct from denying that the insurance company had such a sum of money on deposit at the time the license was issued. (Page 73.)
2. **BANKS AND BANKING—LIABILITY OF BANK.**—The directors of a stock fire insurance company, being required to raise \$50,000 paid up capital before a license could be obtained, each executed a joint note to the company for that amount, which was good for that amount, and was transferred to a bank, which loaned that sum to the insurance company. Upon the faith of this deposit, an annual license was issued to the insurance company. The next day the note was taken up by the insurance company, and held for the remainder of the year. The Auditor of State knew these facts, and tacitly acquiesced in what was done. *Held* that the proceeds of the note did not constitute a trust fund in the bank's hands, nor render it liable upon the subsequent insolvency of the insurance company. (Page 75.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit was brought by appellant, as receiver of the People's Fire Insurance Company, against appellees, State National

Bank and L. W. Cherry. When the suit was instituted, R. S. Hamilton was also a party defendant, but his death abated the suit as to him. We will hereafter designate the State National Bank as the "Bank," and the People's Fire Insurance Company as "Insurance Company." L. W. Cherry was president of the Bank, and R. S. Hamilton was its cashier.

The complaint in substance alleged that on the 5th day of March, 1905, the Insurance Company had on deposit with the Bank a paid-up capital of \$50,000; that on that day by virtue of said capital paid in and on deposit in the Bank and the presentation to the Auditor of State of a certificate of deposit to that effect he was induced to and did issue to the Insurance Company a certificate to do business as a stock fire insurance company in the State of Arkansas; that on the next day the appellees conspired with the secretary of the Insurance Company to withdraw from deposit the \$50,000 which had been deposited to the credit of the Insurance Company, and which constituted its only paid-up capital; that the money by this conspiracy was withdrawn without the consent of all the stockholders of the Insurance Company; that such withdrawal was illegal; that the Insurance Company held out to the public that it had a paid-up capital of \$50,000, and on the faith of such representation the public was induced to take out policies of fire insurance, and to transact business with the Insurance Company; that the withdrawal of the \$50,000 was a deceit and fraud upon the rights of the creditors and stockholders of the Insurance Company because it rendered the Insurance Company insolvent though it continued to do business some two years after the withdrawal of the \$50,000; that appellees stood by and permitted obligations to be made and liabilities to accrue on the faith of the representations of the Insurance Company that it had on deposit with the Bank the sum of \$50,000 as paid-up capital. The complaint further alleged that the \$50,000 on deposit with the Bank was a trust fund for the benefit of creditors; that appellees knew that it was a trust fund, and that in law appellees now have in their hands the sum of \$50,000 and the profits arising therefrom.

The prayer was that the defendants be required to pay into court, for the use and benefit of the creditors and stockholders of said Insurance Company, said \$50,000 and prof-

its arising therefrom from March 6, 1905, so that the same might be apportioned among the creditors and stockholders with the other funds and assets which the receiver had in his hands as such receiver, for costs and all other relief.

The Bank filed a separate answer, denying that on March 6, 1905, it, with Cherry and Hamilton, conspired with the secretary of said Insurance Company to withdraw a deposit, or that said deposit was withdrawn without the consent of said company, or was in any manner withdrawn illegally, and alleging that said company was one of its depositors in 1905, and placed its deposits there, like all others, subject to check, and that all its deposits were in due course of business so drawn out by it through its duly credited officers, and that from time to time its deposit book was balanced and all checks returned; and denying that it holds \$50,000, or any sum, belonging to said company, and the profits thereof; denying that it has been guilty of conspiracy with Cherry, Hamilton and said secretary in deceiving the public or in taking or keeping the moneys of said company, and alleging that the charges of plaintiff are wholly false and untrue as to it.

Cherry answered, denying that he, with said bank and Hamilton, conspired with said secretary, or with any one, to withdraw said deposit or any deposit; alleging upon information that all moneys deposited were withdrawn on proper checks of the officers of said company, with all of which he had nothing to do; denying that he alone, or with any one, drew from said bank said sum or any sum, and denying that he was a party to any fraud or deceit upon the creditors or stockholders of said company, or any one else, at any time; denying that he was connected with or responsible for the failure of said company; alleging that he was not an officer or stockholder thereof, and had no right to handle its funds, and did not do so; denying any information as to whether the funds deposited were the paid-up capital of said company, or as to drawing out the same, whether by consent of the stockholders or not; denying that the capital stock of said company was a trust fund, or that any such funds were placed in his hands, or that he ever knew what the capital stock of said company was, never having handled any of same; denying that he alone, or with said

bank, or Hamilton, has or ever had said sum, or the profits thereof; denying that he has been a party to any conspiracy with said Bank, or Hamilton, or said secretary, in deceiving the public or in taking or keeping the moneys of said company, and avers that the allegations of said bill are wholly false and untrue as to him. All other allegations were denied.

The facts are substantially as follows: The Insurance Company was organized as a stock company with Dan W. Jones, W. M. Kavanaugh, A. B. Poe, R. D. Plunkett, W. H. Boone, J. W. Holland and Isaac S. Humbert as its directors. In order to raise the \$50,000 paid-up capital required by section 4335, Kirby's Digest, to enable it to do business in the State, its directors, as above, executed a note to the company for \$50,000, each individually signing the note. The plan was to present this note to the Auditor of State as paid-up capital and get the license. The note was presented to him, but he refused to issue license on the note, suggesting that they might borrow the money on the note. Holland, the secretary of the company, was authorized to borrow the money. He entered into negotiations with Hamilton, cashier of appellee Bank, and succeeded in borrowing the sum of \$50,000. Hamilton testified that the Bank made the loan of \$50,000 on either a demand or one day note; that when the note was made it was intended that it should be taken up inside of four days. It remained to the company's credit about one day. The money was subject to check. He thought it was subject to check only for the payment of the note. He did not know whether he would have honored a check for \$50,000 except to be applied on the payment of the note. There was no understanding that it should be used for no other purpose. Hamilton further testified as follows: "No understanding was entered into between Cherry, myself and the parties signing the note that it should be used to meet the requirements of the company in getting its charter. They said they needed the money in the organization of the company. The \$50,000 was not a trust fund to be held by the Bank until withdrawn. The loan was not for the purpose of becoming the paid-up capital of the Insurance Company. I did not understand that it was. I supposed they were going to use it in their organization some way; was informed that the

company had other assets. I received stock to the amount of \$1,000. Holland represented that he wanted me to come into the company as a director to help him with the business. That was the consideration for the stock. There was no agreement to the effect that Cherry and myself would loan the company the money so that it could use it in its organization—obtain its certificate from the Auditor. The consideration for the loan was not the certificate of stock issued to us. We paid nothing at the time of the issuance of the stock for it. The Bank received the interest on the note—8 per cent. discount for four days, as I recollect it. The loan was handled as any other loan of the Bank at that time. The application was made about a week before the loan was made. The matter was talked over by myself and Col. Cherry. The loan was made on the recommendation of Mr. Cherry.”

Dan W. Jones was president of the Insurance Company. He assisted Holland in making the negotiation for the loan. They were authorized to execute the note for the Insurance Company to the Bank. They did so. The Insurance Company's name was signed to the note by Dan W. Jones, its president, and Holland also signed it. The note signed by the directors to the Insurance Company was attached as collateral to the note executed by the Insurance Company to the Bank. Holland testified that he told Hamilton that they could not organize and establish the company without the \$50,000, but did not tell him that the company needed it to pass the Auditor. He told Hamilton they would not draw out the money if they could do without it, but if they needed it would certainly check on it. Jones testified: “There was no agreement with the Bank that the money should remain only a few days, nor was it understood that we were not to use the money. I said I do not think we will ever have occasion to draw on this note, but, understand me, I do not want to deceive you; if it is necessary, if we incur debts, you are liable to pay this money. We had the understanding that it was not to be used except in the case of emergency. It was negotiated the same as any other loan.”

Neither Jones nor Holland talked with Cherry about the loan. Cherry, the only other party to the negotiation, testified concerning it: “The note was submitted to me by Mr. Hamil-

ton, who was cashier of the bank at the time. I had the negotiation with Mr. Hamilton only. Hamilton had the negotiation with the parties, and referred the matter to me. I talked with no one about it except Hamilton. Do not know what the object of the loan was. The note was made upon the consideration of the value of the note secured by these parties. The consideration was the obtaining of the banking business of the insurance company and its bank account. The money was placed to the credit of the insurance company. The loan was made like any other loan that comes up there. We took the note, credited the money—the proceeds—to the insurance company's account; that was all there was to it. The note and collateral were held in the bank for the loan. No understanding as to how long the money was to remain in the bank. It was placed subject to the credit of the Insurance Company. It was subject to its check. The money remained a few days, to the best of my knowledge. I was not present when it was paid back to the bank, nor when the note was delivered up. Soon after it was paid I was informed of it. I don't know what they used the money for. They did business with us about a year and a half. They had more money in the bank than the \$50,000. Their balance ran from \$1,000 to \$11,000, and they drew checks on the bank for that money until it was all drawn out. I knew most of the men on the note. I considered them good for \$150,000. Would not have made the loan if I had not considered the note good. I understand the negotiations for the loan were between Hamilton, Holland and Jones. Nothing was ever said about the money being placed in the bank as a trust fund, and I knew nothing of a trust fund in connection with it. It was there subject to the check of the People's Fire Insurance Company. No discussion about a certificate from the Auditor or passing the Auditor was ever had in my presence. I know nothing about the license or the obtaining of the license from the Auditor of the State. We looked only to the collateral note for the repayment of the loan. I was never present at a board meeting at which the loan was discussed. I never discussed the loan with any officer or director of the insurance company. I had nothing to do with the negotiation of the loan other than passing upon it when Hamilton reported the application to me."

Three witnesses, towit, Boone, Humbert and Plunkett, testified that Hamilton and Cherry were present at a meeting of the board of directors of the Insurance Company when the question of securing the \$50,000 necessary to enable the Insurance Company to secure license was being discussed, and that an agreement was then and there entered into between the directors of the Insurance Company and Hamilton and Cherry that the Bank would furnish the Insurance Company \$50,000 to enable it "to pass the Auditor."

Plunkett testified: "It was agreed and understood in the meeting that we were to hold the money long enough to get our charter, which we did. This was discussed in the presence of Cherry and Hamilton." Boone testified that "the loan and deposit was made in the Bank for the purpose of passing the State Auditor. It constituted the capital stock of the Insurance Company, and was sworn to in order to get our charter. It was to remain there in the Bank as capital stock." All of these witnesses testify that, in consideration of the Bank furnishing the \$50,000, the Insurance Company was to issue \$1,000 of its stock each to Cherry and Hamilton. Humbert testified that "the \$50,000 was the capital stock of the Insurance Company." "I do not know," he says, "what understanding was had about it staying in the Bank." Two other witnesses, towit, Poe and Kavanaugh, testified that Cherry and Hamilton were to receive a commission each of one thousand dollars of stock of the Insurance Company for securing the loan of \$50,000 from the Bank. But both of these witnesses state that their testimony as to Cherry and Hamilton receiving the two thousand of stock of the Insurance Company as a commission was based on what was told them, and on reports to the board after the Auditor had granted the Insurance Company license. On the other hand, Holland, Jones, Hamilton and Cherry all testify that the stock given to Hamilton and Cherry had no connection with the loan whatever, that it was given them after the loan had been consummated, and that this stock was given them to interest them in the Insurance Company, so as to give the Insurance Company, if possible, the fire insurance which these gentlemen controlled, and to give the company business prestige by having such business men interested in and connected with it.

It was shown in evidence that the \$50,000 remained on deposit in the Bank to the credit of the Insurance Company one day. The records of interest and discount on the books of the Bank were examined, and did not show that any interest was paid on the \$50,000 note of the Insurance Company during the month of March, 1905. The note of the Insurance Company to the Bank was paid by check of the Insurance Company signed in the usual way by its president, secretary and treasurer. The note was surrendered with its collateral to the Insurance Company. The collateral note was kept by the secretary of the Insurance Company until the next annual license was obtained. The next license was obtained upon a showing made to the Auditor that R. D. Plunkett had deeded to the Insurance Company land worth the sum of \$50,000. Plunkett took stock of the Company to the amount of \$50,025 for his land. It was shown that the Auditor knew that the \$50,000 deposited with the Bank by the Insurance Company had been taken down, but he did not require of the Insurance Company any additional security, let the matter run on until the next annual license was issued, when it was shown that the Insurance Company had a deed to land worth \$50,000. The company continued to transact business for some time thereafter. It was declared insolvent, and went into the hands of a receiver the 19th day of January, 1907. The evidence is undisputed that the note executed to the Insurance Company for \$50,000, signed by A. B. Poe, R. D. Plunkett, W. M. Kavanaugh, W. H. Boone, J. W. Holland, Dan W. Jones, I. S. Humbert and W. T. Brown, and deposited as collateral with the Bank, was worth at least \$50,000. The court dismissed the complaint for want of equity.

Robt. L. Rogers and Downie, Rouse & Streepy, for appellant.

The purpose of the statute (Kirby's Dig. § § 4335, 4336, 4337 and 4338) is to afford better security to members and policyholders. 33 N. Y. 437; 88 Am. Dec. 386. An action against a corporation may be maintained to recover damages caused by a conspiracy. 106 N. Y. 669; 12 N. E. 825; 68 Ark. 305; 15 Ohio, 659; 45 Am. Dec. 596; 25 Barb. 583; 97 Ga. 673; 36 L. R. A. 631; 109 Mo. 446; 19 S. W. 248.

B. S. & J. V. Johnson and Marshall & Coffman, for appellees.

The money borrowed was merely assets belonging to the company. 16 S. C. 524. The trust fund doctrine does not apply to anything but unpaid stock subscriptions. 17 Wall. 610; 139 U. S. 96; *Id.* 118; *Id.* 417; 50 *Id.* 371; 59 Ark. 562. Some direct connection between the bank and appellant is essential to a recovery. 50 C. C. A. 623; 57 L. R. A. 108. No other penalty can be exacted or enforced than that provided by the act. 49 L. R. A. 523. No one has a right to rely on a representation except the one sought to be influenced by it. Cooley on Torts, 493; Kerr on Fraud, 93; 96 N. Y. 100. When an agent acts for himself, he does not bind his principal. 63 Ark. 418; 69 Ark. 140.

Robt. L. Rogers and Downie, Rouse & Streepy, in reply.

Appellee made the fraud possible and is liable for the damages caused thereby. 109 Mo. 446; 19 S. W. 248. The principal is civilly liable for the frauds committed by his agent in the course of his employment. Clark & Skyles on Agency, 1103; 139 N. Y. 290. The receiver, as the representative of creditors, may maintain an action to recover assets belonging to a corporation. High on Receivers, § 315; Beach on Receivers, 4967; 72 N. Y. 275; 20 L. R. A. 86.

Wood, J., (after stating the facts). Under the provisions of chapter 90, Kirby's Digest, the Auditor of State is charged with the duty of seeing that "all the laws of the State respecting insurance companies are faithfully executed." To this end he "is impowered to appoint and commission actuaries and examiners to issue and, upon cause shown, to revoke licenses or permits to transact business of insurance, and, when legal cause exists, to suspend the business of any company of this State; * * * to require free access to books and papers belonging to any such company or companies; to summon and examine persons relative thereto," etc. Kirby's Dig. § § 4326-30.

"No insurance company shall be allowed to transact business of insurance in this State until it shall have a *bona fide* subscribed capital of not less than one hundred thousand dollars, with a paid-up capital of not less than \$50,000. Section 4335, Kirby's Dig. Other sections prescribe severe penalties against persons, companies or corporations for transacting the business

of insurance without complying with the law. Subdivisions eight, nine and ten of section 4330 of Kirby's Digest prescribe the methods of procedure on the part of the Auditor to cancel the license or suspend the business of an insurance company that is 'insolvent or fraudulently conducted.' The purpose of all these provisions of the law is to protect the public, who insure, against worthless insurance companies, and the Auditor of State, who is designated by law to represent the public, is clothed with plenary power in the premises. If the Bank conspired with the Insurance Company to falsely represent to the Auditor of the State that the Insurance Company had on deposit with the Bank the sum of \$50,000 for the purpose of inducing the Auditor to grant a license to the Insurance Company to transact business, and if the Auditor upon such representation granted the Insurance Company license, then the bank would be estopped by its conduct from denying that the Insurance Company had such sum of money on deposit with it at the time the license was issued.

In a suit at the instance of the Auditor under section 4330, division eighth, Kirby's Digest, or by the receiver under sections 950 and 954, to recover such sum as an asset of the insolvent insurance company the bank would be estopped from denying that it held such sum as an asset of the insurance company. This is the doctrine of *Ellerbe v. Exchange National Bank*, 109 Mo. 446, upon which appellant relies. In that case the cashier of the bank exhibited to the insurance commissioner a false entry of deposit showing that the insurance company had to its credit a certain sum, when in fact the amount was \$21,500 less than the sum certified. The false certificate was made for the purpose of enabling the insurance company to pass the insurance commissioner. In a suit by the insurance commissioner against the bank to hold the latter liable for the \$21,500 as an asset of the insolvent insurance company, the court held that, the bank having certified and exhibited books to show that the insurance company had on deposit with it a certain sum of money for the purpose of enabling the company to secure license to transact business, and license having been obtained upon such representation enabling the insurance company to transact business and to create obligations, under these circumstances the

bank would not be heard to say that it did not have the money as represented. The bank accordingly was held to account for the money as an asset of the insurance company. The doctrine of that case is sound, but it has no application here. For this case differs radically in its facts from that. Here the complaint alleges, and the proof shows, that at the time the secretary of the insurance company exhibited to the Auditor its pass book, or deposit slip, showing that the Insurance Company had on deposit with the Bank the sum of \$50,000, such was the fact. This representation was true. While witnesses on behalf of appellant testify that the understanding between the officers of the Insurance Company and the Bank was that the latter should furnish the money to enable the former to pass the Auditor, not one testifies that the loan in fact was not made. Not one testifies that the loan was not made upon the faith of the collateral which was put up to secure it. Only one (Plunkett) testified that the Insurance Company did not obtain possession of the money. But all of the other testimony shows he was mistaken; and indeed the allegations are that the Insurance Company had on deposit with the Bank the sum of \$50,000. The deposit slip and the books of the Bank and all the witnesses (except Plunkett) show that the loan was made and the money passed to the credit of the Insurance Company, and was on deposit to its credit when the secretary of the Insurance Company exhibited to the Auditor the deposit slip. So, even if this slip be taken as a representation or certification by the officers of the Bank to the Auditor that the Insurance Company had on deposit with it the sum of \$50,000, such representation was true, and the Auditor was not and could not have been deceived and defrauded by such representation. Now, if there was a *bona fide* loan of \$50,000 from the Bank to the Insurance Company, the Bank could not be liable because the officers of the Insurance Company used the \$50,000 as paid-up capital to obtain its license from the Auditor, nor could it be liable because the officers of the Insurance Company afterwards used the same \$50,000 to repay the Bank. The Bank had the right to loan the Insurance Company the money, and it also had the right to accept payment of the loan, even though it knew that the Insurance Company was using its capital stock in making the payment. If

the Insurance Company, after obtaining its license, reduced its capital stock below the amount required, the Auditor could have had its license cancelled. He had full power, as we have seen, under the statutes *supra*, and it was his duty, to make inquiries and to ascertain the facts and to protect the public against a condition of that kind. That was no concern of the Bank. There is no evidence to sustain the allegation that the Bank accepted the money of the Insurance Company and was to keep it on deposit as a trust fund. The attempt to hold the Bank and Cherry for the unlawful diversion or conversion of a trust fund must fail. There are no allegations that the officers of the Insurance Company and the officers of the Bank entered into a conspiracy to procure a license from the Auditor for the Insurance Company to transact business, and that such license was procured upon a false representation, made in pursuance of this conspiracy, that the Insurance Company had on deposit with the Bank the sum of \$50,000.

These allegations, if made with the others in the complaint, would have brought the case within the rule announced in the case of *Ellerbe v. Exchange Nat. Bank, supra*. Appellant now contends, however, that the evidence at the hearing developed the whole transaction, and that the so-called loan and deposit was a mere subterfuge to deceive the Auditor and to defraud the public. The evidence does not warrant such conclusion. The officers of the Insurance Company were authorized to negotiate just such loan for the purpose of securing the \$50,000 needed for its paid-up capital. The directors not only authorized the loan, but individually signed a note to the Insurance Company which was to be used in procuring the license or the money itself, if the Auditor would not accept the note. This note was *bona fide*, and saves the whole transaction from the taint of fraud. It is undisputed that the note was worth the sum of fifty thousand dollars, for which it was hypothecated. Cherry knew the men on the note, and considered them good for \$150,000. The officers of the Bank took the note as collateral, and made the loan. There is no evidence that the officers of the Bank would have made the loan without this collateral note. That made the Bank secure. After the note to the Bank was paid, the secretary of the Insurance Company held this

note of the directors to the Bank as an asset of the company, he says, until the next annual license was issued. While this note was not paid-up capital, in the strict sense, because it was not actually paid, yet there was not a day from the time it was executed until the next annual license was issued that the sum of fifty thousand dollars could not have been realized out of the note. The Auditor seems to have been so well satisfied of this that he did not "make any fuss about it," and let the company go on, although he knew that the money on deposit as the Insurance Company's paid-up capital had been withdrawn. The Auditor had correctly held that the paid-up capital did not have to be cash, but might be in an investment in land or other assets of the value of \$50,000. The officers of the Insurance Company, after the license had been obtained, concluded that the individual note of the directors to the Insurance Company was an asset that was worth to the company the full sum of \$50,000 required by the law to be paid up. Doubtless, if the Auditor had required it, they could have secured at any time the sum of \$50,000 on the note. Hence they concluded to pay off the note to the Bank that was bearing interest against the Company and to take up and hold the collateral note which was bearing interest in the company's favor. This was done without the direct authority of the Auditor in advance, but since he knew about it, and did not object to it, and was the only one who could object to it, the company had his authority by acquiescence, and the public was not therefore defrauded or imposed upon by this act of the officers of the Insurance Company in paying off the note to the Bank, and in taking and holding the note of the directors to the Insurance Company. Suppose the officers of the Insurance Company had converted the note into land or money or some other asset, which they doubtless could have done. The result would have been the same. Instead, they held the note till the next annual premium day when the Auditor approved a deed to land from one of the signers of the note to the Insurance Company, estimated by him to be worth the sum of \$50,000, as paid-up capital of the Insurance Company and issued license. A clear preponderance of the evidence shows that neither Hamilton nor Cherry was present at a meeting of the board of directors of the Insurance Company

when the matter of making the loan was discussed. While some of the witnesses say they were present at such meeting, the greater number of witnesses show that they were not present at such meeting.

We are of the opinion that the testimony of Hamilton and Cherry, representatives of the Bank which made the loan, and the testimony of Jones and Holland, representatives of the Insurance Company to which the loan was made, all tends to prove that the loan was *bona fide*, made in the usual course and upon gilt-edge security. The evidence to sustain the charge of conspiracy contended for here should be clear and convincing. We do not find it so. Therefore the Bank and Cherry are not liable, no matter what disposition the Insurance Company made of the sum borrowed.

The judgment is correct.

Affirm.

McCULLOCH, C. J., disqualified.

HART, J., concurs in the judgment.

YOUNG v. BERMAN.

Opinion delivered June 27, 1910.

1. LANDLORD AND TENANT—OFFER TO SURRENDER—LIABILITY FOR RENT.—A mere offer, upon the part of a lessee, to surrender the leased premises, unless actually executed, does not operate as a surrender, nor relieve the lessee from liability to pay rent. (Page 83.)
2. SAME—LIABILITY FOR RENT.—A lessee who remains in possession after the lessor has broken his covenant to repair is not relieved of his liability to pay rent, but is entitled to damages for such breach, which he may recoup against a recovery of the rents. (Page 83.)
3. SAME—COVENANT TO REPAIR—DAMAGES.—The damages recoverable by a tenant for breach of the landlord's covenant to repair are such damages as result directly from the breach, and which would make good the actual loss caused thereby. (Page 84.)
4. DAMAGES—DUTY TO REDUCE.—A party injured by a breach of contract must make reasonable effort to prevent or reduce the damages; and where he can, by reasonable exertion or expense, arrest the loss caused by such breach, the measure of damages is the amount of such expense. (Page 84.)

5. LANDLORD AND TENANT—BREACH OF LEASE—MEASURE OF DAMAGES.—Where there has been a breach of agreement on the part of a landlord to make repairs, if the repairs are extensive and the cost excessive in comparison with the rent, the measure of the tenant's damages is the diminution in the rental value of the property by reason of such nonrepair; but where the repairs are inexpensive as compared with the rent, the measure of the tenant's damages is the cost of making the repairs. (Page 85.)
6. SAME—BREACH OF LEASE—BURDEN OF PROOF.—Where a tenant sues for failure of the landlord to make certain repairs as agreed, the burden is upon the tenant to prove the actual cost of making such repairs, and that the expense of making same would be excessive in comparison with the amount of the rent. (Page 85.)
7. SAME—BREACH OF LEASE—DAMAGES.—Where, upon breach by a landlord of an agreement to repair, the tenant did not vacate but retained the premises, he had a right to make the repairs and to recoup against the rent the cost of such repairs and the value of the premises if he was deprived thereof while the repairs were being made. (Page 85.)
8. APPEAL AND ERROR—HARMLESS ERROR.—The exclusion of competent evidence was harmless where the fact which it tended to prove was otherwise established by undisputed evidence. (Page 86.)

Appeal from Sebastian Circuit Court, Fort Smith District;
Daniel Hon, Judge; affirmed.

STATEMENT OF THE COURT.

This was an action instituted by the appellees to recover for the rent of a two-story brick store house situated in the city of Fort Smith. The original complaint was filed in May, 1909, and sought to recover the rent for the month of April, 1909. The cause was not tried until November 6, 1909, and on that day it was agreed by the parties orally in open court that the complaint might be considered amended so as to sue for rents due under the hereinafter mentioned lease for the months of April, June, July, August, September, October and November, 1909. There is a question as to whether or not the rent for the month of November was included in this amendment, which will be hereafter further noticed. The action was founded upon a written lease. On January 1, 1909, the parties entered into a written contract by which appellees rented to appellant the above property for a term of two years at a rental to be paid monthly in installments of \$187.50 per month from the first to the fifth of each month. The contract con-

tained the following provisions relative to the repairs of the property: "Any repairs deemed necessary by lessee on the inside of the building for his convenience to be made by him at his own expense with the consent of the lessor, and all repairs and alterations so made to remain on premises without cost to lessor, excepting that lessee may remove all shelving, gas and electric fixtures and furniture. Lessor to keep building in habitable repair at all times. Said lessee and all holding under him agree to use reasonable diligence in the care and protection of premises during the term of this lease; to pay water license assessed against property; to keep water pipes and plumbing in order, unless beyond his control or power to prevent. It is understood that said premises are to be kept free of all nuisances, whether of privy, yard, cellar or sewer, at the expense of said lessee. The lessee obligates himself to keep the premises at all times free from the accumulation of ashes, trash or any rubbish."

The appellant had been in possession of the building for some years under a prior lease. On December 19, 1908, he wrote to appellees that the building was in an unsanitary condition, caused by the faulty construction of the sewer, which admitted sewage into the basement; and he asked the appellees to make repairs necessary to remedy the condition. On December 22, 1908, the appellees replied by letter saying that they had sent a plumber to investigate the matter, and that he had reported that he could correct the defect. They also claimed in the letter that the unsanitary condition was due to negligent acts of appellant, and stated that they would do their part towards placing the premises in perfectly sanitary condition, and that it was the duty of appellant to make certain alterations in his management of the building and to keep it in sanitary condition. After this correspondence the above written contract of lease was prepared and sent to appellant for his execution. He signed same, and sent it to appellees with a letter in which he stated that "my acceptance and signing of this lease is conditioned" that the repairs which appellees agreed to make in the above letter of December 22 would be promptly attended to. In their complaint the appellees alleged that the appellant had paid the rents for the months of January,

February, March and May, 1909, but had failed to pay the rents for the other months above-named. In his answer the appellant alleged that appellees had failed to make the repairs to keep the building in habitable repair as required by the contract; that, by reason of this breach of the contract on the part of appellees, he had surrendered the lease and therefore was not liable for the rents sued for. He also alleged that he was damaged by reason of the failure of appellees to repair the building, and sought a recoupment of such damages against any claim that appellees might have for rents.

The appellant introduced testimony tending to prove that appellees had failed to place and keep the building in a sanitary and habitable condition. On the other hand the appellees introduced testimony tending to prove that about the time of the execution of the lease they had employed a plumber who corrected the defect in the sewer, and that they had placed the building in a sanitary condition and kept it in habitable repair; that after the repair of the sewer had been made the box over the drain had been disturbed and the cover broken, causing some water to accumulate in the cellar, and that this was due to acts of appellant.

The undisputed proof was that appellant was and continued in possession of the building under the lease, and sublet it during the months of February, March and April. On March 3, 1909, appellant wrote to appellees, stating that the building was not, and had not been placed, in habitable repair, and asking that it be put in that condition. To this letter appellees made no reply. On April 6 appellant again wrote to appellees, stating that the building was in an unsanitary condition, and on that account he declined to be further bound by the contract, and that he was ready to turn over the building; and requested them to indicate to whom they desired him to deliver the keys. On April 10 appellees replied that they declined to accept a surrender of the lease, and insisted that they had complied with the provisions of the contract on their part. Subsequently appellant again wrote appellees that he surrendered the lease and tendered to them the keys of the building, which appellees refused to accept. The uncontroverted evidence shows that appellant did not vacate the building or actually surrender the possession

thereof. He remained in the possession of and actually occupied it during all the months from the date of the execution of the contract to the day of the trial. He paid the rent for the month of May, 1909, and had an application from a merchant to rent it in May, 1909, and refused to do so, not because he had abandoned it and did not have the right to sublet it, but because, as he claimed, this person desired to rent only a part of the building, and for a short time.

At the request of the appellees the court gave among others the following instructions:

"D. If the jury find from the evidence that the building was not in habitable repair during any of the months for which plaintiffs sue for rent, defendant would be entitled to a credit on the rent sued for, whatever amount you find from the evidence it would cost to put the building in habitable repair.

"E. The jury will find for the plaintiff \$187.50 for each of the months sued for with 6 per cent. interest on each month's payment from the first day of the month it was due to the present time. And, if you find from the evidence that the building was not in habitable repair during any of these months, you will find for the defendant for the amount you find from the evidence it would cost to put it in habitable repair, and from the two sums so found you will strike a balance and return the verdict accordingly."

The appellant requested a number of instructions, which were refused. They embodied substantially the following declarations: that if the appellees failed to keep the building in habitable repair so that same became unfit for the purpose for which it was rented, then appellant had the right to cancel the lease, and would not be liable for any rents.

The jury returned a verdict in favor of appellees for the rents of all the months except November.

Ira D. Oglesby, for appellant.

Read & McDonough, for appellee.

As long as the lessee remains in possession, the failure to put in improvements as agreed would not relieve the lessee from his liability to payment. Jones, on Landlord & Tenant, § 673. The tenant can only recoup as damages what it would

have cost him to make such repairs, but not for indirect damage such as the destruction of crops. 39 Ark. 344; 42 Barb. 582; 71 Ark. 251; 62 Ark. 393; 33 Ark. 632. No motion for a new trial necessary. 54 Ark. 468; 57 Ark. 370. Plumbing includes the sewer and drain pipes. 34 Atl. 549.

FRAUENTHAL, J., (after stating the facts). The appellant contends that he was entitled to an instruction embodying the principle that, in event the appellees failed to comply with their covenant to keep the building in habitable repair, then the appellant could not be compelled to comply with his covenant to pay rent. In other words, it is urged that if the appellees first committed a breach of the contract of lease then appellant had the right to cancel and surrender the lease, and in such event would not be liable for the rents of the building. He relies upon the principles announced by this court in the case of *Berman v. Shelby*, 93 Ark. 472, to support this contention. But we do not think that the doctrine set out in that case is applicable to the facts in this case. In that case, upon a breach of the covenants in the contract of lease on the part of the lessor, the lessee vacated the property and surrendered the actual possession thereof. Thereupon the lessor took actual possession of the property and leased it to other parties. In the case at bar the appellant, according to the uncontroverted testimony, did not vacate the building, but continued to occupy it and hold the actual possession thereof for all the months for which recovery was had. He only tendered back the keys of the building and offered to surrender the possession thereof. A mere agreement for a surrender of the leased property, where not actually executed, does not operate as a surrender. There can be no such surrender unless, in addition to the offer or tender of surrender, there is an abandonment of the property by the lessee and a resumption of the possession by the lessor; or such a vacation and relinquishment of the property by the lessee as will justify a resumption of the actual possession by the lessor. Where the lessee continues to occupy the premises and hold the possession, there is no surrender thereof, and the mere tender of the keys or the offer to turn over the possession will not operate as such a surrender. Such a tender or offer to surrender is like a tender of payment without actual pay-

ment, or like an accord without satisfaction; in all of which cases there is no bar to recovery. 24 Cyc. 1163-1372; *Fish v. Thompson*, 129 Mich. 313. As long as the lessee remains in possession, he is not relieved of his liability to pay rent; he is entitled, under such circumstances, only to a claim for damages for a breach of some covenant in the lease on the part of the lessor which he may recoup against a recovery of the rents. Jones on Landlord & Tenant, § 673.

There has been a diversity of opinion in the courts of the various States as to the measure of the damages to which the lessee is entitled when the lessor has failed to comply with his covenant to repair. In some courts it has been held that he may recover all damages which may result from such breach; in others, that the measure of the damages is the diminution in the rental value of the premises by reason of such breach. In this court it has been held that the damages which are recoverable in such and similar cases should be compensatory only; that is, such damages as result directly from the breach, and which would make good the actual loss caused thereby. A party injured by a breach of contract must make reasonable effort to prevent or reduce the damages. *Walworth v. Pool*, 9 Ark. 394. And if, under the circumstances of the case, he can, by the use of reasonable exertion or reasonable expense, arrest the loss caused by such breach, then the measure of damages which he should recover will be the amount of such expense.

In *Collins v. Karatopsky*, 36 Ark. 31, it was held that damages sustained by a lessee in the death of a member of his family from the failure of the lessor to repair were too remote and could not be recouped against a demand for the rent. In the case of *St. Louis, I. M. & S. Ry. Co. v. Sanders*, 91 Ark. 153, it was held that the measure of damages for a breach of a contract to build or repair a levee was not the damages to the crops and land resulting from an overflow caused by said breach, but that the true measure of the damages in such case was the cost of building or repairing the levee. In *Varner v. Rice*, 39 Ark. 344, it was held that in an action for rent the tenant may recoup, as damages for the landlord's breach of covenant to repair, the amount it would have cost the tenant

to make the repairs. See 2 Wood on Landlord & Tenant, p. 897, § 400; Jones on Landlord & Tenant, § 592; *Sparks v. Bassett*, 49 N. Y. Super. Ct. 270; *Green v. Bell*, 3 Mo. App. 291.

Where there has been a breach of an agreement on the part of the landlord to repair, the general rule for the measure of the damages growing out of such breach is that, where the repairs to be made are extensive, and where the cost thereof would be excessively large and expensive in comparison with the amount of the rent, the diminution in the rental value of the property by reason of said breach or the difference between the rental value of said property without such repairs and the rental value of the property with such repairs would be the measure of the damages recoverable. But where the character of the repairs are not extensive, and are not thus costly and expensive in comparison with the rent, the measure of the damages caused by a breach to make such repairs would be the cost thereof. *Miller v. Sullivan*, 15 Am. & Eng. Ann. Cases, 561, and note thereto.

It is incumbent upon the party claiming the damages growing out of such a breach to prove the actual cost of making such repairs, and by such evidence to show that the expense of making same would not be slight but large and excessive in comparison with the amount of the rent. In this case the appellant has introduced no testimony as to the actual cost of making the repairs which he contends the landlord agreed to make. On the other hand, the testimony introduced by appellee as to the actual cost of making such repairs shows that the expenses of making same would have been small. Under the circumstances of this case the measure of the damages for the breach by appellees of their agreement to repair was the cost of making the repairs.

In the case at bar the appellant did not vacate the leased premises upon the alleged breach of the contract committed by appellees, but retained possession thereof. Under the circumstances of this case he had a right to make the repairs which appellees had failed under their covenant to make and to recover the cost thereof from appellees, and the value of the use of the premises during the time he may have been deprived thereof while making the repairs; and, in event appellant did not make

the repairs, then he had the right to recoup, as damages against a recovery of the rent, the cost of such repairs. We are of opinion, therefore, that the court was correct in all its rulings upon the instructions.

At the trial of the case the court refused to permit the introduction of the above letters that passed between the parties prior to the signing of the lease. It is urged that these letters became a part of the written contract because the lease was signed and delivered by appellant only on condition that the agreements made by appellees in the letter of December 22 to make certain repairs should be a part of the written contract. But we do not think that the exclusion of said letters was prejudicial. In the contract of lease the appellees had covenanted to keep the building in habitable repair, and this, we think, covered every promise of repair made by appellees in said letter. The appellant introduced testimony tending to prove that appellees had failed to make all such repairs, and the court instructed the jury that the appellant was entitled to recover as damages the cost of all these repairs. This was the full measure of his damages; and the appellant was entitled under the undisputed evidence to no other right or remedy by reason of the breach by appellees to make any repairs mentioned in said letter or in the written lease. We do not think, therefore, that the exclusion of said letters constituted any prejudicial error.

At the time that the pleadings were orally amended during the progress of the trial some doubt was expressed by counsel in the presence of the jury as to whether or not the rent for the month of November, 1909, could be sued for. This doubt was expressed for the reason that it was thought that the rent for November was not at the time of said amendment payable under the contract. The amendment was not made in writing. The jury specifically named the rents for each of the other months in their verdict, but made no mention of the rent for November. We are of opinion that under these circumstances the rent for the month of November was not included in the amendment, and therefore was not put in issue in the case, and was not sued for. The judgment in this case cannot therefore

be a bar to any suit hereafter seeking to recover the rent for the month of November, 1909.

Finding no prejudicial error in the trial of this case, the judgment is affirmed.

FOGEL v. BUTLER.

Opinion delivered June 13, 1910.

1. JUDGMENT—CONCLUSIVENESS.—To render a judgment in one action conclusive in a subsequent one, it must appear that the particular matter sought to be concluded was raised and determined in the prior suit. (Page 89.)
2. SAME—CONCLUSIVENESS.—A former judgment restraining the defendant from interfering with the plaintiff's contract right to cut the timber from "what is known as the second bench" on certain land, without determining what the "second bench" was, will not preclude the defendant from litigating the question as to what was meant by the words "second bench" in such contract and judgment. (Page 90.)
3. INSTRUCTIONS—REPETITION.—It was not error for the trial court to refuse to repeat instructions asked in varying form. (Page 91.)
4. TRESPASS—CUTTING TIMBER—TREBLE DAMAGES.—It was not error, in trespass for cutting timber, to charge that the defendant would be liable for three times the value of the timber if he cut it "without authority and knowingly." (Page 91.)
5. TRIAL—ARGUMENT OF COUNSEL—OBJECTION.—Alleged error in the argument of counsel will not be considered if the record merely shows that counsel for appellants excepted to the remarks, but does not show that they asked or obtained a ruling of the court in reference thereto. (Page 92.)

Appeal from Polk Circuit Court; *James S. Steel*, Judge; affirmed.

J. I. Alley, *Hal L. Norwood* and *W. H. Rector*, for appellant.

The former adjudication was admissible in evidence, and was conclusive. 2 Black on Judg., § § 784-788; 1 Freeman on Judg., § 282. The statements made by counsel were improper and prejudicial. 87 Ark. 461; 61 Ark. 138; 58 Ark. 473; 48 Ark. 131; 70 Ark. 305; 71 Ark. 427; 74 Ark. 256; 75 Ark. 577.

Wright Prickett and *Elmer J. Lundy*, for appellee.

There was no former adjudication unless the cause of action was the same. 64 Ark. 301; 18 Ark. 142; 62 Ark. 76; 55 Ark. 286; 66 Ark. 336. Parol evidence to apply the description to the land in question was admissible. 28 Ark. 282; 40 Ark. 237. Specific objection should have been made to the evidence. 76 Ark. 400; 82 Ark. 555; 7 Ark. 470; *Id.* 524; 9 Ark. 389; 18 Ark. 392. A mere exception without calling for a ruling is insufficient. 74 Ark. 256; 38 Ark. 304.

HART, J. This is an appeal by J. H. and Lyman Fogel from a judgment rendered against them in the Polk Circuit Court in favor of Thomas A. Butler. The action was in trespass to recover damages for 300 oak trees, valued at \$300, which Butler alleged the Fogels had wrongfully cut and removed from his lands.

J. H. Fogel had purchased a tract of land for the timber there was on it. Some time in June, 1908, he sold the land to Butler, and also made the following agreement with him in regard to removing the timber on it:

"Howard, Ark., June 23, 1908.

"This is to certify that I, Thomas A. Butler, agree to allow the J. H. Fogel Lumber Company to cut and remove all timber on the fractional west half ($\frac{1}{2}$) of section one (1), township one (1) south, range thirty-two (32) west, containing one hundred and twenty-eight and 93-100 acres, at any time, or any or all of said timber before April 1, 1909, and to haul over or across said land at any time or place, for said length of time, free of charge. I further agree to give said J. H. Fogel Lumber Company eighteen months to remove all timber on upper land, described and understood between J. H. Fogel and T. A. Butler, to be located on second bench, but said J. H. Fogel Lumber Company must not haul across my fenced clearings after April 1, 1909. I further agree to fence nothing but cleared land until said time has expired.

"Thomas A. Butler."

The timber was cut and removed from the land after April 1, 1909, and before the expiration of eighteen months thereafter. The dispute between the parties is as to what lands comprised the second bench within the terms of the contract.

The appellee introduced evidence to show that the land runs along a creek. The land next to the creek he calls bottom land, and that on the first elevation the first bench. On the latter his house was situated. Back next to the mountain about 150 yards is another elevation, which he says is the second bench. There are forty-five acres on it, and appellee says that it was on what he calls this second bench that appellants were to have eighteen months to remove the timber. On the other hand, appellants claim that the bench on which appellee's house was built was the second bench; and that they had eighteen months to cut and remove the timber therefrom. The timber in controversy was cut from that bench. Each party introduced testimony to sustain his contention. Appellants also introduced in evidence a decree of the Polk Chancery Court entered at a regular term of said court, held on the 27th day of September, 1909. The appellants in this suit were the plaintiffs in that action, and the appellee was the defendant. The decree recites that the complaint in the case asked that a restraining order be issued against the defendant, enjoining him "from in any way interfering with the plaintiff in the removal of any and all timber off of what is known as the second bench, situated on west fractional half of section 1, township 1 south, range 32 west, in Polk County, Arkansas, under and by virtue of a contract entered into between plaintiff and defendant on the 23d day of June, 1908," and provides "that the defendant, Thomas A. Butler, is restrained and enjoined from in any way interfering with the plaintiff from cutting and removing the timber mentioned in said contract from the above described lands until the 23d day of December, 1909."

It is now contended by counsel for appellants that this decree is conclusive of the present suit, but we can not agree with their contention. In the case of *McCombs v. Wall*, 66 Ark. 336, the court held (quoting from syllabus): "To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear, by the record or by extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit." It will be seen from the language of the decree introduced in evidence that the matter litigated in that suit was the right of appellant to cut the timber on

the second bench, and the appellee was enjoined from interfering with his right to do so until the 23d day of December, 1909, the date of expiration of eighteen months from June 23, 1908, when the contract was entered into. No extrinsic evidence was introduced to show what was meant by the words "second bench," as used in the decree, and we are left in as much doubt in that regard by the decree as we are by the terms of the contract of June 23, 1908. Hence the court did not err in submitting to the jury the question of what was meant by the parties to the contract by the use of the words "second bench" in the connection in which they appear in the contract of June 23, 1908.

Next, it is insisted by counsel for appellants that the testimony of the witnesses introduced by appellee to prove what they understood to be the second bench was clearly incompetent. It is admitted by counsel for appellants that no exceptions were saved to the introduction of this testimony, but they claim that they asked the court to exclude it from the jury in an instruction prepared on the subject, and that the court refused their request. The record shows that, after the court had instructed the jury, one of the attorneys for the appellants said to the court that he wished to ask additional instructions, and that the court granted him leave to proceed. The attorney then said: "Now, your Honor, we want you to exclude all of that testimony of those witnesses that have come in here and testified about the different benches up there because they were not present and did not know what the understanding of the parties was at the time." By the court: "Gentlemen of the jury, as you understand this land that the timber was on was sold under a written contract, the parties agreeing at the time what was to be termed the first and second bench, or the lower and upper lands, that is a question for you to decide what the understanding between the parties was at the time, and not what some one else calls the first and second bench. So you will decide now what the understanding of the parties was at the time this contract was signed as to what was termed the first bench or lower land and the second bench or upper land. I believe that is about as plain as I can give it, gentlemen."

Afterwards counsel for appellants asked the court to give the instruction the refusal of which they now urge as grounds for reversal.

It is manifest from the above that the court granted the request of appellants, and in plain terms told the jury to decide what was the first and second bench, as understood by the parties to the contract at the time it was made, and not as it was understood by the witnesses in the case. It was useless to repeat this to the jury, and the court did not err in refusing the instruction complained of. It is the settled rule of this court that it is not error to refuse to repeat instructions in varying forms. Indeed, it is not good practice to do so. *Aluminum Co. of North America v. Ramsey*, 89 Ark. 522.

The court, over the objection of the appellants, also gave the following instruction:

"If the jury believe from a preponderance of the evidence that the defendant did, without authority, cut any timber off of the lands of the plaintiff, you will find for the plaintiff the value of the timber so taken; and if you further find from a preponderance of the evidence that the defendants cut certain timber from the plaintiff's land without authority as above defined, and did so knowingly and unlawfully, you will allow three times the value of the timber actually taken."

Counsel for appellants say that this instruction was based upon section 7978 of Kirby's Digest, and is erroneous because it does not tell the jury in the language of the statute that if it "shall appear that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed * * * was his own," the plaintiff shall recover single damages only.

It will be observed that the instruction as given by the court told the jury that if they found that the defendant cut the timber without authority and knowingly, the jury should allow three times the value of the timber. Now, it is manifest that the court meant, and that the jury understood, that, before treble damages should be given, the jury must find not only that the defendants had no authority to cut the timber, but that they knew they had no such authority. It is apparent that if they cut the timber, knowing that they had no authority

to do so, they cut it without having probable cause to believe it to be their own. It is also apparent that the word "value" was understood to be the market value.

It is finally insisted that the judgment should be reversed because the court erred in not excluding from the jury certain remarks made by the attorney for the appellee. The record shows that counsel for appellants excepted to the remarks, but it does not show that they asked or obtained a ruling of the court in reference thereto. In the case of *Kansas City Southern Ry. Co. v. Murphy*, 74 Ark. 259, the court said: "The control of argument is in the sound judicial discretion of the trial judge, and it is his duty to keep it within the record and within the legitimate scope of the privilege of counsel, and this he should do on his own initiative; if he fails to restrain counsel, then it is the right of opposing counsel to object to the argument. This should be a definite objection to the alleged improper remarks, and call for a ruling of the court thereupon, and if the court then fails to properly restrain and control the argument within its proper bounds, and to instruct the jury to disregard any improper remarks and admonish the counsel making it, then an exception should be taken to the action of the court. A mere exception to argument interposed to make a record in the appellate court, and not calling for a ruling of the trial court, is insufficient."

The judgment will be affirmed.

WATERS-PIERCE OIL COMPANY v. ROBERTS.

Opinion delivered October 10, 1910.

TAXATION—BOARDS OF EQUALIZATION—TIME OF COMPLETING WORK.—Kirby's Digest, § 6998, requiring boards of equalization to give notice to the owners of property raised in valuation, and requiring the owners of such property to appear before the county court on the first Monday in October to show cause why the valuation should not be raised, contemplates that the equalization of assessments shall be completed before the county court meets in October, and any action taken by the board of equalization after that date is void.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed.

J. D. Johnson and Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. It is settled that an injunction will lie to restrain the collection of illegal or unauthorized taxes, and the court therefore had jurisdiction. Kirby's Digest, § 3966; art. 16., § 3, Const.; 124 S. W. 1021; 126 S. W. 727.

2. A county board of equalization must complete its work before the first Monday in October. Kirby's Digest, § 6998, § 1499 sub-div. 1 and 6, § 1500. The same principle applies here as in the case of circuit courts where, it is held that the term of the court in one county is necessarily terminated by the coming of the time for holding the court in another county in the same circuit. 48 Ark. 227; 69 Ark. 457; 82 Ark. 189; 20 Ark. 77; 24 Ark. 479; 27 Ark. 414; 32 Ark. 676; 29 Ark. 239. See also 3 Ark. 1; 48 Ark. 151; 55 Ark. 213; 84 Ark. 347; 90 Ark. 419; 49 Ark. 519.

3. The notes and accounts of appellant were not taxable in this State. *Prima facie* the *situs* of debt for the purposes of taxation is the domicil of the creditor. 15 Wall. 300; 100 U. S. 498; 24 So. 224; 153 U. S. 628; 44 La. Ann. 760; *Id.* 765; 67 Md. 112; 59 Ind. 472; 54 Ia. 67; 3 Col. 349; 3 Ariz. 180; 60 Pac. 574; 25 So. 970; 15 Mont. 462; 150 N. Y. 5.

George L. Basham, James A. Gray and David A. Gates, for appellee.

1. There is nothing in the statutes creating the board of equalization and defining its duties which either expressly or by fair implication limits the term of the board. Kirby's Digest, § § 6991-7008. With respect to raises in the valuation of personal property, appeals may be made to the county court, and relief may be granted at any time before the end of tax-paying time—April 10. Kirby's Digest, § 7003. See 90 Ark. 413. Boards of equalization are not courts, and their functions are merely ministerial. 46 Ark. 383. And the principle limiting the term of a circuit court has no application.

Statutes limiting the time of assessing or equalizing the value of property for taxation are directory, and not mandatory.

46 Ark. 383; 3 Mass. 231; 2 Denio, 160; Cooley on Taxation, 486; 44 Minn. 12; 31 Minn. 373; 101 Ia. 458; 93 Ky. 230; 34 Mich. 481; 63 Fed. 82; 46 Pa. St. 358; 13 Wall. 506; 15 Nev. 388; 34 Ark. 491; 6 Wend. 486; 26 Ala. 619; 3 Hill 42; 29 Md. 516; 104 N. Y. 377; 106 N. Y. 330; 58 N. Y. 401; 58 Ala. 456; 43 Ark. 244; 116 Cal. 351.

2. The notes and accounts of appellant, acquired in the transaction of its business in this State, are taxable in this State. While it is the rule that, for purposes of distribution, notes, accounts, etc., follow the domicile of the owner, yet for purposes of taxation each case depends upon its particular facts and circumstances. Personal property, whether tangible or intangible, must pay taxes to the sovereignty within whose jurisdiction it may be situated. Kirby's Digest, § § 6973, 6904, 6910, 6916, 6917; 32 Pa. 381; 21 Vt. 159; 14 Kan. 588; 19 Kan. 414; 48 N. Y. 390; 88 N. Y. 576; 23 N. Y. 238; 51 Barb. 352; 35 Minn. 215; 28 Cal. 533; 5 S. Dak. 84; 18 Ore. 377; 19 Neb. 50; 47 Mo. 594; 106 Ill. 25; 87 N. C. 122; 175 U. S. 307; 177 U. S. 143; 35 Minn. 215; 191 U. S. 388; Desty on Taxation, 322, § 67; Burroughs on Taxation, § 50; 118 Ga. 552; 115 Ga. 140; 2 L. R. A. (N. S.) 637; 10 *Id.* 920; 12 *Id.* 907.

3. A corporation doing an interstate business should be taxed in each State in the proportion the capital employed therein bears to the total capital employed in its business. 166 U. S. 186; 63 Ark. 576.

4. No question having been raised as to the amount of credits carried by the Arkansas business of appellant, the assessment as to amount must be assumed to be correct. Even if the board of equalization could not legally act after the first Monday in October, yet, if these credits are taxable in this State, a court of chancery ought not to interfere by injunction to relieve appellant of a tax *due and unpaid*.

McCULLOCH, C. J. At a session of the board of equalization of Pulaski County, held on November 18, 1909, the sum of \$35,000 was added to appellant's assessment of personal property in that county. The taxes were extended on the tax books according to the valuation thus augmented, and appellant now seeks by injunction to prevent the collection of the additional

amount. It is claimed that the board of equalization was without authority to alter assessments after the time fixed by law for the October term of the county court.

It is clear to us, from the language of the statute, that the Legislature intended that the county boards of equalization should complete their labors in the equalization of assessments within the period between the second Monday in September and the meeting of the county court in October, so that complaints of the action of the board can be disposed of by the county court at the October term thereof. The statute provides that said boards shall meet on the second Monday in September of each year, except in counties having two judicial districts the board for the district where the levying court does not meet shall meet on the first Monday in September and proceed to equalize the property of the district. Other sections of the statute bearing on the question read as follows:

"Sec. 6998. The county board of equalization in every instance where it raises the valuation of any property, personal or real, shall give to the owners of the property so raised in valuation, or their agents, notice by postal card or otherwise through the mails of such increase in value, stating the valuation as returned by the assessor and the valuation as fixed by the board, and said notice shall advise the owners of such property or their agents that they may appear before the county courts of their county at the terms thereof to be begun and held at the county seat on the first Monday of October next following the session of said board, and show cause, if any they can, why the valuation of their property should not have been raised.

"Sec. 6999. The board of equalization shall attend at said term of said court and show cause, if any they can, why such valuations were raised in cases where complaint is made of such increase. The county court shall hear and determine all complaints made by the owners or agents of such property and approve or reject the action of said board as the facts may warrant, and such action of the county court shall be final unless the owner or agents of such property as make complaint shall take an appeal to the circuit court."

It is to be especially noted that the foregoing sections of the statute provide for notice to property owners in time to

be heard at the October term of the county court, and that the members of the equalization board shall attend at said term of the court and answer the complaints of such property owners. Under the statute, owners of real estate are limited to that term of the county court in presenting their complaints. *Clay County v. Brown Lumber Co.*, 90 Ark. 413.

This court, in an opinion by Chief Justice COCKRILL, has already placed this construction on the statute. *Baird v. Williams*, 49 Ark. 518. It was there said: "It would be attributing folly to the Legislature to hold that complaint to the board is a condition to the exercise of its powers, when the party against whom the complaint is made is not to be notified and cannot demand a hearing. The session is limited to two or three weeks. The delay of waiting to be moved, of giving notice to all concerned, and of hearing each individual, would render the main functions of the board impossible of performance."

A more serious question is presented in determining whether the statutory provision for the completion of the equalization of assessments before the county court meets in October is mandatory or merely directory. The rule is well settled, not only by decisions of this court, but by the great weight of authority elsewhere, that a statute specifying a time within which a public officer or board is to perform an official act concerning the assessment and collection of taxes is directory merely as to the time within which the act is to be done unless, from the nature of the act or the phraseology of the statute, the designation of time must reasonably be construed a limitation upon the exercise of such power, or unless the performance of the act within the specified time may materially affect individual rights. *Moore v. Turner*, 43 Ark. 244.

In the case just cited the court was construing a statute requiring the county assessor to deliver his assessment lists to the county clerk on or before the third Monday in September, and it was decided that the statutory provision was merely directory. The court said: "The obvious nature of the act is to have it (the assessment list) before the court for inspection when taxes are levied, unless we may further perceive that a failure to file it at the time prescribed, has the effect also

to preclude a just right. This would give the time an essential nature."

Now, when it is remembered that the owner of real estate must obtain relief from an overvaluation of his property by the equalization board, if he does so at all, by application to the county court at the October term thereof, the conclusion is irresistible that the Legislature meant, as a mandatory provision of the law, to require boards of equalization to complete the work of equalizing the valuations of property before the county court convenes in October. It is true that, as to personal property, the owner is given the right to apply to the county court for relief from overvaluation at any time before the collector of taxes closes his books (Kirby's Digest, § 7003); but we fail to discover any intention of the lawmakers to authorize the board of equalization to remain in session longer for the equalization of the values of the one kind of property than of the other. The work of the board is intended to be continuous, and the provision with reference to completing the work of equalization before the October term of the court applies to all kinds of property.

The statute, when thus interpreted, provides an orderly mode of completing the valuation of property for purposes of taxation, and amply safeguards the property owner from unjust overvaluation. After the assessor completes the assessment of values, the board of equalization, within a given time, equalizes the values by increasing or reducing, as the case may be, so as to accomplish the desired scheme of equalization. Then the county court hears applications of property owners for relief from overvaluation. This completes the scheme of assessment, and the taxes levied by the quorum court are extended on the tax books by the clerk according to the equalized values. Speaking of this, the court in *Baird v. Williams*, *supra*, said: "The remedy provided by the statute for the correction of errors made by the board is a protection against injury to the individual. The statute requires a record to be made of the proceedings of the board; like all other records, they are open to the inspection of the public; and, at a term of the county court held thereafter, at a time and place specifically designated by statute, the opportunity to appear and show cause against

the findings of the board is provided. A notice through the mails to the taxpayer whose assessment is increased is also required out of an abundance of caution. The party aggrieved is thus afforded the opportunity to appear before a judicial tribunal to have his rights adjudged before he has suffered any injury."

Though the placing of this time limitation on the work of the equalization boards may, at this day, seriously hamper them to an extent not anticipated by the Legislature when it enacted the statute more than two decades ago, still that is a matter for the Legislature to consider now, and not one which appeals to this court in construing the statute. It is our duty to interpret the statute according to settled rules of construction, and not according to what the law should be.

This construction of the statute leads to the decision that the action of the equalization board in increasing the valuation of appellant's property was without authority and void, and the collection of the increased assessment of taxes should be restrained. The decree of the chancery court is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice WOOD dissents.

Mr. Justice BATTLE not participating.

TATUM v. BOLDING.

Opinion delivered October 10, 1910.

SPECIFIC PERFORMANCE—PAROL AGREEMENT.—A parol agreement by A to advance money for B to buy land and to take the title to the land to A as security will not be specifically enforced in equity, in the absence of clear and satisfactory proof of such agreement, even though there was sufficient possession by B to take the case out of the statute of frauds.

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; reversed.

Marsh & Flenniken, for appellants.

The testimony does not support the findings of the chancellor. It should be "full, clear and conclusive."

Appellees' possession was merely incidental to their logging contract with Tatum, and was not sufficient to take this case out of the statute of frauds. 31 Ark. 481.

Where one purchases land with his own money, no contemporaneous or subsequent parol declaration of a trust can affect the title. 42 Ark. 503. It is void within the statute of frauds. 42 Ark. 481. An express trust in land cannot rest in parol. 67 Ark. 526.

J. H. Green and J. B. Moore, for appellees.

1. The evidence sustains the decree, and meets the requirements of the law as laid down by this court in 44 Ark. 334.

2. The evidence of appellees' possession and improvements made is clear and convincing, and possession alone, under a verbal contract of sale, will support a suit for specific performance. 44 Ark. 334.

McCULLOCH, C. J. C. W. Mumford, of Union County, Arkansas, owned a quarter section of timber land in that county, and on October 14, 1902, conveyed it for a consideration of \$550 to appellant, B. F. Tatum, who was engaged in buying logs for the Bayou Sara Lumber Company, a Louisiana corporation. Tatum sold and conveyed the land to the Ouachita Lumber Company on July 17, 1906, and in November, 1906, appellees, J. O. Bolding and W. W. Bolding, instituted the present action in the chancery court of Union County against Tatum and the Ouachita Lumber Company, and an agent of the latter, alleging that they (appellees) purchased the land from Mumford and caused the conveyance to be made to Tatum upon the latter's oral agreement to advance the purchase price for them and hold the title as security for the loan, which was to be repaid by the delivery of logs at a stipulated price; that they had repaid the purchase price to Tatum by delivery of the logs, and that the latter, in violation of his alleged agreement, had refused to convey the land to them, and had sold it to the Ouachita Lumber Company. Appellants denied that appellees purchased the land, or that Tatum had agreed to convey it to them, and also denied that the Ouachita Lumber Company had any notice of appellee's claim. The chancery court found in favor of appellees, and rendered a decree accordingly, directing the conveyance of the land to them.

Mumford offered the land for sale, and also a wagon and team. Appellees purchased and paid for the wagon and team, which was delivered to them. Tatum paid for the land, and it was conveyed to him by Mumford; but appellees testified that they were the purchasers, and that, being unable to pay for the land and the wagon and team, Tatum had agreed to advance the money for them and hold title to the land as security. This is disputed by Tatum, who testified that he purchased the land for himself and paid for it, in order to get the timber.

Appellees moved on the land in July, 1903, and built two small houses, dug a well and fenced a few acres of it. They cut a considerable quantity of timber during two logging seasons, and delivered same to Tatum, who paid them at the rate of five dollars per thousand feet. They claim that, in addition to that, they were to be credited with one dollar per thousand feet on the purchase price of the land. Tatum testified that he authorized them to cut the timber for him, and paid them the customary market price for such timber, after deducting the price of stumpage, which was equivalent to selling them the standing timber and buying back the logs when cut.

At the time the testimony in the case was taken, one of the houses erected by appellees had fallen down, and the other was in a dilapidated condition. Appellees occupied the land only during the two logging seasons while they were cutting timber, and never cultivated any of it. According to a preponderance of the testimony, the two houses were mere "shacks," built for temporary occupancy, and the lot fenced in by appellees was a corral for the stock used in logging. Each side introduced testimony in corroboration of their respective contentions, and it is difficult to determine which side preponderates. But a mere preponderance of the testimony in favor of appellees is not sufficient to sustain a decree in their favor. Conceding that the temporary possession by appellees was sufficient to take the alleged parol agreement of Tatum out of the operation of the statute of frauds, a court of equity should require clear and satisfactory proof of such agreement before enforcing it by decreeing a conveyance of the land. *Tillar v. Henry*, 75 Ark. 446; *Mason v. Harkins*, 82 Ark. 569.

The state of the proof in the present case does not meet that requirement. There is a sharp conflict in the testimony which, as already stated, is about evenly balanced; and no circumstances are established which corroborate appellees in their claim. They have not paid a cent of the purchase price, except, as they claim, by delivering logs to Tatum; and that is consistent with the latter's equally plausible explanation that he paid them the price of the logs after deducting the price of his stumpage. Their possession of the land for a time was not of such a character as to indicate a claim of ownership, any more than it indicated merely a temporary occupancy while they were cutting the timber, as contended by appellants. Every circumstance in the case is perfectly consistent with Tatum's contention that he purchased the land for himself; and since the conveyance was to him, the proof should be clear and satisfactory that it was not what it purported to be, an absolute conveyance of the land. It is true that the deed was to Tatum as "agent," but all parties agree that he was agent for the Bayou Sara Lumber Company, and had the deed thus made because he used the funds of his principal in making the purchase.

In addition to this, the proof is far from satisfactory that the Ouachita Lumber Company had any notice whatever of appellee's claim when it purchased the land from Tatum. There is not even a preponderance of the evidence in their favor on that issue.

We are therefore of the opinion that the evidence does not sustain the finding of the chancellor. So the decree is reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

BENNETT v. STATE.

Opinion delivered October 10, 1910.

1. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT.—Where the accused enters a plea of guilty, his motion in arrest of judgment questions only the sufficiency of the indictment. (Page 104.)

2. **FORGERY—ALLEGATION OF TENOR.**—An indictment for forgery of a certain writing, which alleges that the writing is of the tenor and effect as follows, to wit, etc., and sets out the writing in detail, will be held to set out the writing according to its tenor. (Page 104.)
3. **INDICTMENT—EFFECT OF SURPLUSAGE.**—An indictment will not be invalidated by the use of superfluous words whose use was a clerical mistake if they do not in any sense obscure the meaning of the instrument. (Page 104.)
4. **FORGERY—INDICTMENT—CORPORATE ORGANIZATION.**—An indictment for forging a railroad time check with intent to defraud the railroad company and another corporation is not defective in failing to charge that such corporations were domestic corporations. (Page 104.)

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; affirmed.

D. L. King, for appellant.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

1. There is nothing in the contention that the indictment is defective because the instrument alleged to have been forged was not indorsed. It was not necessary to prove that it was endorsed. 91 Ark. 485; 77 Ark. 537.

2. The appearance of the statutory phrase "against the peace and dignity of the State of Arkansas" in the body of the indictment, at a place where it does not belong, does not vitiate the indictment. Indictments will not be quashed for mere clerical misprisions, where substantial rights of defendants are not prejudiced thereby. Kirby's Digest, § 2229; 65 Ark. 559; 75 Ark. 574; 58 Ark. 47; 92 Ark. 413; 93 Ark. 275; 126 S. W. 1053; Joyce on Indictments, § 202.

3. It was not necessary to allege that the corporations named in the indictment were in Arkansas, nor even their corporate existence. 48 Ark. 94; 126 S. W. 1053.

HART, J. Appellant was indicted for forgery. The indictment, omitting the caption, is as follows:

"The grand jury of Lafayette County, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, Henry Bennett (*alias* Bud Bennett), of the crime of forgery, committed as follows, to wit: Said defendant, on the 10th day of May, 1910, in Lafayette County, Arkansas, then

and there did unlawfully and feloniously make, forge and counterfeit a certain paper writing, purporting to be a bank check, which said false and forged writing is of the tenor and effect as follows, towit:

"Roll No. 368. Form 403. Check No. 2662.

"St. Louis Southwestern Railway Co. \$7.25.

"June, 1910.

"St. Louis, Mo., June 30, 1910.

"Pay to the order of Bud Bennett one 25-100 dollars.

"Paymaster St. Louis Southwestern Ry. Co.

(June 30, 1910).

"In full payment for services as entered on pay rolls, for first period, June, 1910.

"To State National Bank of St. Louis, St. Louis, Mo.

"G. K. Warner,

"Memam Treasurer.

"Pay Check.

"This check will not be honored unless presented for payment within thirty days from date of paymaster's stamp; not valid if drawn for more than three hundred dollars.

"This check is also payable by any station agent of the company, when in funds.

"Against the peace and dignity of the State of Arkansas. And the false and fraudulent making, forging and counterfeiting of the paper writing aforesaid was done with the fraudulent and felonious intent then and there to cheat and defraud said St. Louis Southwestern Railway Company, a corporation, and one Stewart Dry Goods Company, a corporation, to obtain possession of the money and property of the said St. Louis Southwestern Railway Company, a corporation, and said Stewart Dry Goods Company, a corporation, and to cause each of them to be injured in their estate, against the peace and dignity of the State of Arkansas.

"O. A. Graves,

"Prosecuting Attorney, Eighth Circuit."

Appellant entered a plea of guilty, and his punishment was fixed at a period of two years in the State penitentiary.

A motion was filed in arrest of judgment on the ground that the indictment did not sufficiently describe the charge. The

motion in arrest was overruled. Appellant seeks by this appeal to reverse the judgment.

This is not a case where the alteration of a genuine instrument is charged in the indictment, and the question of whether in such a case the indictment should set forth the alterations with proper averments showing the alteration of a material part thereof, does not arise. The indictment in question charges that the whole instrument was forged. Appellant entered a plea of guilty, and his motion in arrest of judgment only questions the sufficiency of the indictment. *State v. Bledsoe*, 47 Ark. 233; *McCoy v. State*, 46 Ark. 141.

An indictment similar in form was recently held good in the case of *Evans v. State*, 94 Ark. 400. The opinion in that case was based upon the reasoning of the court in the case of *Crossland v. State*, 77 Ark. 537, and is adverse to the contention of appellant.

Again, it is contended by counsel for appellant that the phrase "against the peace and dignity of the State of Arkansas" following the sentence "this check is also payable by any station agent of the company when in funds" renders the indictment fatally defective. The words in question follow the part of the indictment which sets forth the alleged forged instrument, and do not in any sense obscure its meaning. Their use was a clerical mistake, and does not render the indictment defective. *Blais v. State*, 94 Ark. 327; *Evans v. State*, 58 Ark. 47; *Hunter v. State*, 93 Ark. 275; *Grayson v. State*, 92 Ark. 413, and cases cited.

In the case of *Blais v. State*, 94 Ark. 327, it was held that in an indictment for forgery it is unnecessary to state whether the association or company intended to be defrauded was a corporation or partnership. This disposes of the objections of appellant that the indictment does not charge that the corporations intended to be defrauded are Arkansas corporations.

The judgment will be affirmed.

WHITE-WILSON-DREW COMPANY v. EGELHOFF.

Opinion delivered October 10, 1910.

1. **BILLS AND NOTES—AUTHORITY TO FILL UP BLANKS.**—When a negotiable instrument is intrusted by one who signs it to the custody of another with blanks left therein, the instrument carries an implied authority to fill up the blanks. (Page 109.)
2. **SAME—AUTHORITY TO FILL BLANKS—EXCEEDING LIMITATION.**—Where the authority given to the maker of a promissory note by a surety to fill in a blank as to the amount to be paid was limited to a certain amount, such authority must be strictly pursued; and if it be exceeded, such excess will be available as a defense against the parties to the agreement and those having notice thereof or who are not innocent holders, but not against *bona fide* holders for value and without notice, and the mere fact that such holder knew that the note was signed in blank would not affect his right. (Page 109.)
3. **AGENCY—DELEGATION OF AUTHORITY.**—While an agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, the rule is otherwise as to powers or duties merely mechanical in their nature, such as the filling of a blank in a note. (Page 110.)
4. **BILLS AND NOTES—PRE-EXISTING DEBT AS CONSIDERATION.**—The acceptance of a note as payment for a pre-existing debt constitutes a taking in due course of business and for value. (Page 111.)
5. **SAME—EXTENSION OF TIME OF PAYMENT AS CONSIDERATION.**—The extension of the time of payment of a matured debt is sufficient consideration for a promissory note. (Page 111.)
6. **SAME—EFFECT OF STIPULATION AS TO ATTORNEY'S FEE.**—The insertion in a note of a stipulation for the payment of an attorney's fee and costs for the collection of the note does not destroy the negotiable character of the instrument, but such stipulation is void and not enforceable here because it is an agreement for a penalty, even though it would be enforceable in the State in which it was executed. (Page 111.)

Appeal from Fulton Circuit Court; *John W. Meeks*, Judge; reversed.

Appellant, *pro se*.

1. When a party signs his name, either as maker, acceptor, indorser or drawer, to a negotiable instrument and intrusts it to another to fill up the contract, he confers upon that other, in favor of *bona fide* holders for value, the right to complete the contract at pleasure, and to bind the party so signing same. 22 How. 97; *Id.* 108; 40 O. 529; 2 Baxt. (Tenn.) 92; 9 Heisk. (Tenn.) 781; 7 Cyc. 529; *Id.* 619; 35 Ark. 146; 33 Ark. 712; 1 Metc. (Ky.) 58; 20 How. 361.

2. It is true that an agent cannot delegate to another the performance of duties which involve the exercise of judgment and discretion, but it is also true that he may delegate to another the execution of duties which are merely mechanical or ministerial, and the performance of such duties by a sub-agent is regarded as the act of the agent, binding upon the principal. 35 Ark. 198; 1 Hill (N. Y.) 501; 60 Mo. 116; 8 N. Y. 398; 31 Cyc. 1428; 108 Ga. 640; 16 Md. 220; 67 Atl. 1068; 51 N. Y. 117; 58 S. W. 953; 50 W. Va. 148; 43 N. W. 800; 6 Harr. & J., 146; 64 Am. Dec. 92; 2 Tex. Civ. App. 524; 3 How. 763.

3. The note sued upon is a Tennessee contract, and appellees are liable for the payment of the 10 per cent. attorney's fee and cost of collection. 13 Pick. (Tenn.) 19. The note was dated at, and made payable in, Memphis, Tennessee. The contract is governed by the law which the parties actually or presumptively intended should govern. 1894 A. C. 202; Quarterly Review (1894) 290-291; 87 Va. 661; 17 Gratt. 47; 12 Wall. 226; 77 N. Y. 573; 84 N. Y. 367; 37 Ala. 702.

4. White-Wilson-Drew Company in accepting Egelhoff's note in settlement of his account with it, without knowledge of any secret understanding between him and Ford, thereby extended Egelhoff's time of payment and became a *bona fide* holder for value. Bigelow on Bills & Notes (2 ed.), 245, and cases cited; 66 Vt. 541; 131 Mass. 397; 3 Cush. 162; 2 Allen 8; 5 R. I. 515; 41 Mich. 397; 3 Kelly 47; 1 Smith (Ind.) 89; L. R. 10 Ex. 153; 14 C. B. N. S. 728; 102 U. S. 14.

Davis & Pace and *Hamlin & Seawel*, for appellees.

1. Appellants are not holders for value, the note having been given for a pre-existing indebtedness. 13 Ark. 150; 42 Ark. 22; 2 Humph. (Tenn.) 192; 3 Head (Tenn.) 176. Since no express agreement is shown to extend the time for payment of the alleged account, this case does not come within the rule that a new consideration would constitute appellant a holder for value. 4 Am. & Eng. Enc. of L., §§ 295, 296, and cases cited.

2. The promise to pay fees for collection rendered the note non-negotiable. 7 Cyc. 586.

3. If Egelhoff was Ford's agent for the purpose of filling the blank in the note, he had no right to delegate his authority to another. 92 Pa. St. 227.

FRAUENTHAL, J. The appellant instituted this suit upon a promissory note against the appellees as the makers thereof. The note is as follows:

"\$758.42. Memphis, Tenn., November 30, 1907.

"On January 25, 1908, after date we promise to pay to the order of White-Wilson-Drew Company seven hundred fifty-eight and 42-100 dollars at First National Bank, Memphis, Tenn., with 10 per cent. attorney's fees and cost of collection after maturity. Value received.

"Clarence Egelhoff,

"J. E. Ford."

The testimony on the part of the appellant tended to prove that said Egelhoff was indebted to it upon account, which was past due on November 30, 1907, and that he on that day delivered to it the above note in settlement of said account. Egelhoff brought the note to appellant at its office in Memphis, Tenn., signed by said Ford and blank as to the amount thereof. After examining the appellant's books and arriving at the amount of his indebtedness, Egelhoff directed J. R. Paine, one of the members of appellant, to write the amount thereof in the note, which was done in his presence. Egelhoff then signed the note, and delivered same to appellant in satisfaction of the account.

The testimony on the part of the appellees tended to prove that said J. E. Ford was a resident of Mammoth Spring, Ark., and that Egelhoff came to him at that place, and stated that he was indebted to appellant in a sum of about \$110; that the amount had not been definitely determined, but that it would not exceed that sum; that he presented the note with amount thereof and desired him to execute it as surety for him. Thereupon Ford signed the note thus made out in blank with the agreement and direction that Egelhoff would take same to appellant at Memphis and there fill out said blank with the amount of said indebtedness, provided that it did not exceed \$110, and, after signing it as maker himself, to deliver same to appellant.

In the bill of exceptions it appears that Egelhoff testified

that at the time he had the settlement with appellant and the amount of ~~his~~ indebtedness was written in the note he did not tell appellant that he was limited by Ford in his authority to fill out the amount of the note. Some time after the bill of exceptions had been duly signed and filed the appellees applied to the lower court for a *nunc pro tunc* order to correct the bill of exceptions relative to the testimony of Egelhoff. It was claimed in said application that Egelhoff testified at the trial of the case that he did notify appellant of the limitation made by Ford on his authority to insert the amount in said note. The lower court refused this application for a *nunc pro tunc* order to correct the record in this particular, and from that order thus overruling said application the appellees have appealed to this court.

The appellant requested the court to give several instructions to the jury, all of which were refused. Among these instructions was the following:

"No. 9. You are further instructed that, should you find that defendant, J. E. Ford, signed the note in blank and gave the defendant, Clarence Egelhoff, authority to fill out the amount in blank, then it would be immaterial for the purpose of this case whether Clarence Egelhoff filled out the blank himself or instructed some one to do it for him; and if you find from the testimony that Egelhoff advised and authorized the filling of the blanks, and they were filled in his presence and for a greater amount than Ford had authorized, yet you should find for the plaintiff unless you find by a preponderance of the testimony that the plaintiff had knowledge of the violation of instructions upon the part of Egelhoff in filling out or permitting the filling out of said note; and the burden to prove such knowledge upon the part of the plaintiff rests upon defendant, J. E. Ford, and unless you so find you should find for the plaintiff."

The court at the request of appellees gave the following instruction:

"No. 3. You are further instructed that, should you find that the defendant Ford had constituted said Egelhoff his agent to fill the blank in said note, that, while he would be bound by the act of Egelhoff in placing the amount therein, still said Egelhoff could not delegate his authority to any one else; and

if you find that some one besides said Egelhoff placed the amount in the blank space in said note, then the defendant, Ford, would not be bound thereby."

The jury returned a verdict in favor of appellant and against said Egelhoff for the amount due upon said note; and against said Ford for \$110 and interest. In his answer said Ford had agreed that judgment might be taken against him for \$110 and interest. Thereupon the lower court entered a judgment in accordance with the above verdict.

The evidence in this case clearly proves that the appellee Ford signed the note herein sued on with the amount thereof left blank. He instructed Egelhoff to fill said blank when the amount should be definitely determined and to deliver the note to the payee. He contends, however, that he gave this power only to Egelhoff, and limited that power to an amount not exceeding \$110. He urges that, because the authority thus given by him was violated in each particular, he is not liable on said note. The note is a negotiable instrument; and when such an instrument is intrusted by one who signs it to the custody of another with blanks left therein, the instrument itself presents an implied authority to perfect the instrument by filling up the blanks. When the extent of the authority given to the party to fill up the blanks is limited, then such authority must be strictly pursued; and if such authority has been exceeded, it will be available as a defense against the parties to such agreement and against those having notice thereof or those who in law are not innocent holders thereof. But such excess of authority will not be available against those who have become *bona fide* holders thereof for value and without notice. The Supreme Court of Ohio in the case of *Fullerton v. Sturges*, 4 Ohio St. 529, states this doctrine and the reasons for its adoption as follows:

"No rule is better settled or founded upon stronger reasons than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which said other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given had been exceeded, or that the confidence reposed had been abused. -It has the effect of a general letter of credit, and the rule is

founded, not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as possessing a more enlarged authority."

When such paper is complete except that the sum is left blank, and is intrusted to an agent to fill in the sum, the party who signed such paper will be bound to pay any sum that is placed therein by such agent, whether it is in excess of the sum so authorized by him to be put in or not to one who is a *bona fide* holder thereof and without notice of any limitation upon the authority of the person having the paper; and the mere fact that the holder knew that it was signed in blank would not affect the rights of such holder. *Michigan Bank v. Eldred*, 9 Wall. 544; *Goodman v. Simonds*, 20 How. 343; *Bank of Pittsburg v. Neal*, 22 How. 97; 1 Daniel on Neg. Instruments, § 142; *Wal-dron v. Young*, 9 Heisk. 777; *Jones v. Shelbyville Fire Ins. Co.*, 1 Metc. (Ky.) 58.

It is further urged by appellees that Egelhoff, with whom he intrusted the paper with power to fill the blank, could not delegate this authority. The general rule is that an agent cannot intrust the performance of the duty or act confided to him to another without special authority from his principal; but this rule only applies to matters in which the agent is required to exercise discretion or judgment, and it does not apply to merely ministerial or mechanical acts. And if such agent directs another to do such merely mechanical or ministerial act in his presence or with his full knowledge, it becomes the act of the agent himself. In the case of *Weaver v. Carnall*, 35 Ark. 198, a principal authorized an agent to borrow \$500, and sign his name to a note therefor. The agent borrowed the money, and at his request and in his presence another signed the name of the principal to the note. It was there held that this was the act of the agent and in legal effect the act of the principal. In that case this court said: "An agent cannot delegate any portion of his power requiring the exercise of discre-

tion of judgment; otherwise, however, as to powers or duties merely mechanical in their nature." *McCroskey v. Hamilton*, 108 Ga. 640; *Lynn v. Burgoyne*, 13 B. Monroe 400; *Grady v. American Central Ins. Co.*, 60 Mo. 116; *Calhoon v. Buhre*, 67 Atl. 1068; *Seymour v. Wyckoff*, 10 N. Y. 213.

In the case at bar the testimony tended to prove that Egelhoff used his own judgment in arriving at the sum that he desired to place in the note, and simply requested Paine to do the mechanical act of writing the sum therein in his presence. That was in effect the act of Egelhoff and bound his principal, Ford.

It is urged by counsel for appellees that the appellant was not a holder of this note for value because it was taken in payment of a pre-existing debt. But by the weight of authority the acceptance of a note as payment for a pre-existing debt constitutes a taking in due course of business and for value. And this court has uniformly held that one who takes negotiable paper in payment of a pre-existing debt before maturity and without notice receives it in due course of business, and is a holder for value. *Hamiter v. Brown*, 88 Ark. 97; *Bertrand v. Barkman*, 13 Ark. 150; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; *Evans v. Speer Hardware Co.*, 65 Ark. 204; *Exchange Nat. Bank v. Coe*, 94 Ark. 387; Bigelow on Notes & Bills (2 ed.), 497; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. Nat. Bank*, 102 U. S. 14.

Furthermore, the evidence in this case tended to prove that the account was past due, and that the note was received in payment thereof, and that thereby the time of payment of the debt was extended to the time of the maturity of the note. This extension of the time of payment of the debt by virtue of the execution of the note was sufficient consideration to make the appellant a holder for value. *Farmer v. First Nat. Bank of Malvern*, 89 Ark. 132; *Bank of Commerce v. Wright*, 63 Ark. 604; *Van Wyck v. Norville*, 2 Humph. 192; *People's Nat. Bank v. Clayton*, 66 Vt. 541.

The insertion in the note of a stipulation for the payment of an attorney's fees and costs for the collection of the note did not destroy the negotiable character of the instrument. *Overton v. Matthews*, 35 Ark. 146; *Trader v. Chidester*, 41 Ark. 242;

Oppenheimer v. Bank, 97 Tenn. 19. But such a stipulation has been held by this court to be void and not enforceable because it is an agreement for a penalty. *Boozer v. Anderson*, 42 Ark. 167.

The appellant also sought a recovery of said attorney's fees, but he is not entitled in this forum to enforce this stipulation. If the validity of the provisions of this note shall be determined by the laws of Tennessee because it was there executed and made payable, and if the laws of Tennessee permit the enforcement of such a stipulation, still it will not be permitted to be enforced in the courts of this State because it is contrary to the policy of our laws. *Arden Lumber Co. v. Henderson I. & W. S. Co.*, 83 Ark. 240.

It follows from the above that the court erred in its refusal to give said instruction 9 asked for by the appellant. There are other instructions which were asked for by appellant and which should have been given. We have not deemed it necessary to set these out in detail for the reason that the principles herein announced will sufficiently indicate what instructions should properly be given upon the new trial which must be granted. We are of opinion also that the above instruction given on behalf of appellees is not a correct declaration of law. It is urged that objection was not properly made to the giving of this instruction. We do not think it necessary to pass on this contention for the reason that the judgment must be reversed for the error in refusing to give said instruction number 9 asked for by appellant.

Nor is it necessary to pass upon the appeal from the order of the court refusing to enter a *nunc pro tunc* order as applied for. The portion of the record that appellees thus sought to correct relates only to testimony, which, if it shall be held to have been given by the witness, was disputed by other testimony in the case, and thus became a controverted question of fact. Upon a future trial of this case the testimony of this witness can be fully developed upon this question.

The judgment is reversed, and the cause remanded for a new trial.

S. F. BOWSER & COMPANY *v*. MARKS.

Opinion delivered October 10, 1910.

SALES OF CHATTELS—AGREEMENT UPON PRICE.—Though the price is one of the essential elements in a contract of sale, if the parties have agreed to all the other elements of the sale, and have made no reference to the price, the law by implication will fix the price, which will be what the article is then reasonably worth.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; reversed.

W. D. Brouse, for appellants.

When, on September 17, appellants notified appellees of the acceptance of their order, the offer and acceptance became a binding contract. 24 Am. & Eng. Enc. of L. 1030; 47 Ark. 519; Clark on Contracts, 42, 43; Lawson on Contracts, 21. The railway company, on delivery of the goods to it, became the agent of the purchaser. 51 Ark. 137, and cases cited.

Appellees, *pro se*.

The minds of the parties failed to meet on one of the essential elements of the contract—the price of the goods. There was no completed sale. 90 Ark. 131; 35 Cyc. 62, and notes. When informed by appellants of the advanced price charged, before the receipt of the goods, appellees had the right to rescind. 17 L. R. A. 558; 4 Ark. 467; 15 Ark. 286; 25 Ark. 192. Appellants should have informed appellees of the advanced price before shipment. 35 Ark. 483. Appellees had the right to rescind because of the mistake in the price of the goods. 66 Ark. 448; 78 Ark. 586; 90 Ark. 78.

FRAUENTHAL, J. This was an action instituted by the appellant to recover the purchase price of an oil tank and pump which it alleged it sold to the appellees. The appellant was located at Fort Wayne, Indiana, and was engaged in the manufacture and sale of oil tanks and pumps and other wares; and the appellees were merchants located at Sheridan, Arkansas. On September 15, 1908, appellees made a written offer to purchase from appellant an oil tank and pump by the following letter:

"Sheridan, Ark., September 15, 1908.

"S. F. Bowser & Co.,

"Fort Wayne, Ind.

"Gentlemen: Please ship me at once one sixty-five gal. oil tank and pump. I bought one of these tanks of you in 1906. Now I would like to have another one.

"Yours truly,

"F. K. Marks & Co."

Upon receipt of said letter on September 17, 1908, appellant wrote to appellees, accepting the order and stating that it would make immediate shipment. Thereafter appellant promptly shipped the oil tank and pump by delivering same to a common carrier properly addressed to appellees, and also sent them bill of lading therefor and a statement showing that the price thereof was \$55. Thereupon appellees wrote to appellant that they had paid \$45 for the tank and pump of the same kind bought from it in 1906, and that they refused to pay \$55 for this last tank and pump. Some further correspondence passed between the parties relating to the price of the tank and pump, and the appellant refused to reduce the price from \$55. In the meanwhile the article had arrived at Sheridan, Arkansas, and remained with the common carrier during the correspondence. On November 21, 1908, appellees reshipped it to appellant, and notified it of that action. The appellant refused to accept the return of the property, and so notified appellees, and thereupon brought this suit for said \$55.

The appellant introduced testimony tending to prove that the cost of the material of which the tank and pump was manufactured in 1906 had advanced, and that \$55 was the current price at which it was sold in September, 1908. The case was tried by the court sitting as a jury, who, among others, made the following declarations of law:

"4. Where the minds of both parties have not met as to price and terms, then there is no sale, and the plaintiffs cannot recover."

"5. The oil pump and tank being shipped to the defendants by the plaintiffs without any agreement as to price, and the price being increased since the defendants previously ordered the same kind of goods from the plaintiffs, and the defendants

returned the goods to the plaintiffs within a reasonable time, refusing to accept them at the advanced price, then the plaintiffs cannot recover."

The court thereupon made a finding in favor of appellees, and rendered judgment in their favor.

The question involved in this case is whether or not the parties had entered into a contract for the bargain and sale of the pump and tank. The appellees contend that the contract was not entered into because the price of the article had not been agreed upon, and that on this account there was no mutual assent to one of the essential terms of the alleged contract. The price is one of the essential elements involved in the agreement to make a contract of sale, and there must be an agreement of the parties to the price, either express or implied, before there can be a completion of a sale. But it is not necessary that the price be expressly stipulated by the parties. If the parties have agreed to all the other elements of the sale and have made no reference to the price, then the law will by implication fix the price, which will be what the article is then reasonably worth.

A contract not only includes the things said or written, but also terms and matters which, though not actually expressed, are implied by law, and these are as binding as those actually written or spoken. In his work on Sales Mr. Benjamin says:

"If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In *Acebal v. Levy* (10 Bing. 376), the Court of Common Pleas, while deciding this to be the rule in cases of *executed* contracts, expressly declined to determine whether it was applicable to *executory* agreements. But in the subsequent case of *Hoadly v. McLaine* (10 Bing. 482), the same court decided that in an executory contract, where no price had been fixed, the vendor could recover, in an action against the buyer for not accepting the goods, the reasonable value of them; and this in the unquestionable rule of law. Benj. on Sales (7 ed.), § 85. See also 1 Mechem on Sales, § 207; Tiedeman on Sales, § 47; 35 Cyc. 101; 24 Am. & Eng. Enc. Law, 1036; *Shealey v. Edwards*, 72 Ala. 175; *Taft v. Travis*, 136 Mass. 95; *Lovejoy v. Michels*, 13 L. R. A. 770.

By their letter of September 15, 1908, the appellees made an unconditional offer to purchase the oil tank and pump, and this offer was accepted by appellant. No price was fixed or mentioned, and the law read the price into the offer. The agreement then became mutual, and the contract of sale completed. And when, in pursuance of such contract, the appellant delivered the tank and pump to a common carrier in the usual course of business, properly addressed to appellees, the title to the property passed to them, and they became liable for the reasonable value thereof at the time of the acceptance of the offer to purchase.

It is urged by counsel for appellees that there was a mistake in the price made by the parties, and that on this account the contract was not assented to by both, and therefore was not effective. It is contended that the appellees understood the price to be \$45, and that appellant understood it to be \$55. It is true that the appellees may have entertained an unexpressed intention to pay only \$45 for the tank and pump. But an agreement is established by the words used, and the law imputes to the parties a meaning corresponding to those words. An unexpressed state of mind of one of the parties cannot affect the agreement as established by the words that are employed. In this case there was no dispute or disagreement about the price, and no misunderstanding by either party thereto. There was simply no reference made to the price. It cannot be said therefore that there was any mistake made as to the price. The fact that appellees had purchased the same kind of article at a certain price in 1906 could not determine the price thereof in 1908. If they had intended to make the offer of purchase at the price paid in 1906, they should have made an express stipulation in their offer to that effect. Failing to name any price, the law implies that they intended to pay for the oil tank and pump the price that it was reasonably worth; and as to such an article as this that would be the current selling price thereof at the time the offer to purchase it was accepted.

The court therefore erred in its declarations of law.

The judgment is reversed, and the cause remanded for a new trial.

SANDERS v. BAGGERLY.

Opinion delivered July 11, 1910.

1. **RELIGIOUS SOCIETIES—DEDICATION OF PROPERTY.**—A conveyance of real property to a trustee as a site for a church house "to be under the control, care and direction of the Cumberland Presbyterian Church" does not constitute a dedication for the purpose of propagating any particular religious faith or mode of worship, but for the use of the congregation of the Cumberland Presbyterian Church at the locality in question, or its legitimate successor. (Page 120.)
2. **SAME—POWER TO FORM UNIONS.**—In every church organization there is an implied or inherent power to unite with other church organizations. (Page 124.)
3. **SAME—AUTHORITY TO FORM UNION.**—Under section 60 of the Constitution of the Cumberland Presbyterian Church providing that "upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof voting thereon, the Confession of Faith, Catechism, Constitution and Rules of Discipline may be amended or changed when a majority of the presbyteries, upon the same being transmitted for their action, shall approve thereof," the church is expressly authorized to unite with another church whose faith may be found to be in harmony with its own. (Page 128.)
4. **SAME—MODE OF EXERCISE OF CHURCH POWERS.**—Under the form of government of the Cumberland Presbyterian Church, all things which are done by the church as a whole must be done by the General Assembly and a majority of the presbyteries, in whom reside all the inherent powers of the church as a whole. (Page 129.)
5. **SAME—CONCLUSIVENESS OF ECCLESIASTICAL DECISIONS.**—Civil courts will not assume jurisdiction of controversies over matters purely of church doctrine or discipline, where no property rights are involved; and even in causes involving civil or property rights, when questions arise concerning matters of church doctrine or discipline which have been decided by a church court vested with such jurisdiction by church laws, the civil courts accept as final and conclusive the decisions of the ecclesiastical court. (Page 132.)
6. **SAME—CONCLUSIVENESS OF ECCLESIASTICAL DECISIONS.**—Under the Constitution and Confession of Faith of the Cumberland Presbyterian Church, the General Assembly was empowered to decide whether the doctrines of the Presbyterian Church in the United States of America and those of the Cumberland Presbyterian Church were in substantial harmony, and its decision to that effect was binding upon the church as a whole. (Page 135.)
7. **SAME—SUBMISSION OF PLAN OF UNION.**—The plan of union reported by the Joint Committee of the Presbyterian and Cumberland

churches, and adopted by the General Assembly of the two churches, provided that the plan should be submitted to the presbyteries by requesting a categorical answer to the question therein propounded. A resolution was adopted by the Cumberland Church instructing the moderator and stated clerk to submit the plan of union to the presbyteries, and this was done by means of a circular letter which submitted a question calling for a categorical answer, and stated: "While the vote is taken simply upon this question, your action thereon will mean the acceptance or rejection of the entire plan." *Held* that the entire plan of union was submitted to the presbyteries. (Page 137.)

8. **SAME—CONCLUSIVENESS OF ECCLESIASTICAL DECISION.**—A finding by the General Assembly of the Cumberland Church that the doctrines of the Presbyterian Church as revised or expounded in 1903 were in substantial accord with those of the Cumberland Church is conclusive upon the civil courts. (Page 139.)
9. **SAME—MODE OF FORMING UNION.**—If a church, acting through its General Assembly and presbyteries, is authorized both to change its doctrinal standard and to form a union with another church, there is no reason why both objects could not be effected at the same time and by the same vote, if both questions were properly submitted. (Page 140.)
10. **SAME—CONSOLIDATION—NAME.**—The union between the Cumberland and Presbyterian Churches was not invalid because the name of the latter church was assumed. (Page 140.)

Appeal from Nevada Chancery Court; *James D. Shaver*, Chancellor; reversed.

John M. Gaut, McRae & Tompkins and *D. L. McRae*, for appellants.

Ecclesiastical decisions are binding on the courts so far as concerns ecclesiastical questions. 91 Tenn. 328; 92 Fed. 214; 106 Pac. 395; 129 Ga. 1; 154 Ill. 394; 58 Ill. 509; 23 Ill. 456; 13 Wall. 679; 218 Ill. 503. The local church is bound by the orders and judgments of the courts of the church. 102 Tex. 324. Union among churches is a perfectly legitimate part of their purpose and their freedom. 41 Pa. 9; 88 Pa. 60. The General Conference represents the sovereign power of the church. 16 How. 288; 90 S. W. 106; 17 Ia. 204; 21 N. Y. 9; 115 S. W. 691. Their union does not destroy the identity of either. 134 Ill. App. 620; 129 Ga. 1. A specific trust is one in which the muniment of title specifies the doctrine to be taught. 13 Wall. 679; 129 Ind. 486; 14 L. R. A. 518; 91 Tenn. 328; 15 L. R.

A. 801. Every donation is made with an implied reference to all of the powers of the church. 198 Ill. 626. A State adopting a statute or constitution of another State adopts it with the construction placed upon it by the State of its creation. 187 Ill. 65; 61 Ill. App. 476; 97 Ill. 421; 161 U. S. 591; 117 Fed. 123; 146 Ind. 466; 150 Ind. 216; 1 Cranch 299; 146 U. S. 37; 41 Pa. 9; 16 How. 288; 14 Bush 256. Where a particular construction is long acquiesced by the church, it becomes established law. 17 Mass. 143; 9 Am. Dec. 123; 1 Cranch 299. The court will take judicial notice of the recorded history of the church. 1 Wheat. 304; 4 Yerg. 528; 18 N. J. Eq. 13. A legislative body is presumed to be consistent with the general policy of the church or State. 92 Tex. 275; 47 S. W. 967; 82 Me. 265; 19 Ala. 465.

Hamby, Haynie & Hamby and W. C. Caldwell, for appellees.

The conveyance created a specific trust for the support of the doctrines of that church. 145 Ind. 361; 32 L. R. A. 839; 83 Ia. 147; 13 L. R. A. 198; 96 Ia. 55; 31 L. R. A. 141; 63 N. H. 9; 16 Am. R. 82; 67 Pa. 138; 5 Am. R. 415; 87 Va. 103; 11 L. R. A. 214; 91 Tenn. 305; 11 Heisk. 458; 79 Miss. 488; 30 So. 714; 121 Tenn. 676; 222 Mo. 613. A court of equity will prevent a diversion of church property in every instance. 12 Wright 20; 67 Pa. 138; 1 Dan. 1; 3 Meriwale 353; 13 Wall. 680; 67 Pa. 138; 7 B. Mon. 489; 108 Tenn. 173; 10 Bush 318; 80 Ky. 443; 5 Bush 112; 14 B. Mon. 39; 54 Mo. 343; 42 Ga. 562. The scheme contemplated the absorption and extinguishment of the Cumberland Presbyterian Church and is therefore void. 121 Tenn. 556; 120 S. W. 873; 222 Mo. 613; 121 S. W. 805; 87 N. E. 1091. The powers of the higher courts of the Presbyterian Church are defined and limited by its constitution. 2 Bush 333; 5 Bush 115; 89 Pa. 97; 5 Yerg. 272; 15 N. Y. 543; 108 S. W. 447; 8 Lea 167; 4 N. J. Eq. 69; 222 Mo. 613. Where the organic law provides for a change to be made in some particular manner, such change can be effected in no other way. 14 L. R. A. 528; 24 *Id.* 621; 6 *Id.* 422; 22 *Id.* 175; 98 Mich. 279; 156 Pa. 119; 93 Pa. 479; 22 Neb. 375; 69 Ind. 505; 46 O. St. 677; 24 Kan. 709; 14 R. I. 651; 26 L. R. A. 78; 24 Ala. 109; 54 Wis. 318; 60 Ia. 543. Church constitutions are treated as contracts. 2 Sawy. 655; 94 U. S. 523; 2

Daly 239; 4 Abb. N. C. 300; 2 Brewst. 571; 25 Kan. 177; 75 N. C. 134; 11 Phila. 166; 14 Bush 278. Constitutional authority must be shown by those asserting it. 89 Pa. 97; 67 Pa. 138; 5 Am. Rep. 415; 2 Bush 332; 5 Bush 110. Civil courts decide civil rights for themselves. 156 Ind. 209; 145 Ind. 361; 97 Ind. 423; 35 Ind. 201; 15 Wall. 131; 12 Bush 541; 71 N. E. 627; 163 Pa. 534; 29 L. R. A. 476; 24 S. W. 52; 36 Neb. 564; 113 Mich. 375; 71 N. W. 627; 62 Ia. 567; 17 N. W. 747; 89 Pa. 97; 56 N. J. L. 401; 18 Vt. 511; 79 Miss 488; 98 Mich. 279; 24 L. R. A. 615; 11 Heisk. 458; *Id.* 523; 91 Tenn. 304; 104 Tenn. 665; 108 Tenn. 173; 54 Mo. 377; 31 Ill. 35; 149 Mass. 341; 21 N. E. 868; 222 Mo. 613; 121 S. W. 805; 121 Tenn. 556; 120 S. W. 873.

McCULLOCH, C. J. This action, which was instituted in the chancery court of Nevada County, involves the question of title, control and use of certain real estate situated in that county at or near Artesian, which, in the year 1885, was conveyed by certain individual owners to a trustee as a site for a church house "to be under the control, care and direction of the Cumberland Presbyterian Church." It is insisted on one side (that of the defendants) that the above-quoted language in the deed created a specific trust for the propagation and support of definite religious doctrines or principles, and that, regardless of other questions in the case, it is the duty of the court to prevent a diversion of the property from the trust attached to its use, and to confine its use to the support of the particular doctrines mentioned. They invoke the following rule, stated by Mr. Justice Miller in *Watson v. Jones*, 13 Wall. 679:

"It seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing, to teach the doctrines or principles prescribed in the act of dedi-

cation, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters."

In that opinion Judge Miller classified under three general heads the questions which usually come before the civil courts concerning rights of property held by religious organizations:

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, support or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

Of the first class above mentioned the learned judge used the language just quoted, and of the second class he said: "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society. In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If

the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property."

And of the third class he said: "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a larger and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government. * * * Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments."

We are of the opinion that the present case falls within the third class referred to, and not the first. For the language of the deed is not sufficient to dedicate the property conveyed to use in the propagation or support of any particular religious faith or mode of worship. The property is conveyed for the use of the congregation of the Cumberland Presbyterian Church at Artesian, or its legitimate successor, and falls within the third class described by Judge Miller.

The property rights involved in this controversy turn on the question of the validity or invalidity of the so-called "Reunion and Union" claimed to have been effected in the year 1906 of the Presbyterian Church in the United States of America, popularly called the Northern Presbyterian Church, and the Cumberland Presbyterian Church, popularly called the Cumberland Church. The validity of those proceedings seems to be seriously called in question throughout the territorial bounds of the Cumberland Presbyterian Church as it existed when the union was

formed, and litigation concerning property rights which depended on the solution of that question has arisen in nearly, if not all, the States within those bounds. Already the courts of last resort of eight States have passed on the question, viz.: (in the order in which the decisions have been rendered) Georgia, Texas, Kentucky, Tennessee, Missouri, California, Indiana and Illinois. All of those courts except those of Tennessee and Missouri held the union to be valid. *Mack v. Kime*, 129 Ga. 1, 58 S. E. 184; *Brown v. Clark*, 102 Tex. 323, 116 S. W. 365; *Wallace v. Hughes* (Ky.) 115 S. W. 684; *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783; *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805; *Permanent Comm. of Missions v. Pacific Synod. Pres. Ch.*, (Cal.) 106 Pac. 395; *Ramsey v. Hicks*, (Ind.), 91 N. E. 344; *First Pres. Ch. of Lincoln v. First Cumb. Pres. Ch.* (Ill.), 91 N. E. 761.

In the controversy which has thus arisen, those who favor the union and litigate on that side are called Unionists, and those who litigate on the other side are called Loyalists. Each side claims the right to use and control the property owned by the Cumberland Church prior to the union. The Loyalists base their claim on the theory that the Unionists, by an abortive attempt to unite with the Presbyterian Church, have seceded from the Cumberland Church and forfeited their right to participate in the use of the property; whilst, on the other hand, the Unionists claim that the Loyalists, by failing to yield obedience to the legally consummated union, have become the seceders and forfeited their right to use the property. The right to control and use the property in controversy is therefore with the party which has the right of succession, and which can successfully identify itself, through its present ecclesiastical connection, with the continuation of the original church organization for whose use the property was granted. The party not found to be so identified is the real usurper. This is a question, too, which, under any view of the law announced in the many decisions bearing on this controversy, it is within the province of the civil courts to decide; and in doing so there is no invasion of the powers of church courts.

The questions for us to decide are, then, (1) Did the Cumberland Presbyterian Church as a church organization possess the power to unite with the Presbyterian Church; and, (2) Was

that power properly exercised so as to effectuate the union and carry with it the property rights involved?

The Cumberland Church had its origin in a schism in the Presbyterian Church concerning the construction of its Calvinistic doctrines, those who separated themselves from that church and organized another church contending that the doctrines of the Presbyterian Church were fatalistic, whereas the great body of the ministry and membership contended that the doctrines were not fatalistic. The Cumberland Church was organized in 1810, and adopted all the doctrinal standards of the mother church save those which were said to be fatalistic, and also adopted the same form of church government. Under the system of church government thus adopted, the church session, composed of the pastor and the ruling elders elected by the congregation, exercised jurisdiction over a single church; the presbytery, composed of the ministers and a ruling elder from each church, exercised jurisdiction over the churches within a prescribed district; the synod, composed of representatives from the churches, exercised jurisdiction over the presbyteries within its bounds, and the General Assembly, composed of commissioners sent by the presbyteries, exercised jurisdiction over such matters as concerned the whole church. The General Assembly is the highest court of the church, and represents in one body all the particular churches thereof.

The Cumberland Church grew rapidly, and presbyteries, synods and a General Assembly were organized, after the form of the Presbyterian Church government. Repeated overtures were made for reunion with the mother church, but all these came to naught until the movement began which resulted in the consummation of a union of the two churches in the year 1906. The Presbyterian Church at its General Assembly in 1900 inaugurated a movement to revise its Confession of Faith, and the revision was consummated in the year 1903. Chapters were added, and what is called a Declaratory Statement was adopted and added, which, as was and is claimed, removed the possibility of a fatalistic construction of its creed, and rendered it substantially in accord with that of the Cumberland Church. The General Assembly of each of the churches in 1903 appointed committees to negotiate a union of the two churches, and these

committees agreed upon a plan designated as a "Plan of Reunion and Union," and presented it to each General Assembly in 1904 as a joint report. The plan thus reported was as follows:

"That the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church be accomplished as soon as the necessary steps can be taken, upon the basis hereinafter set forth.

"1. The Presbyterian Church in the United States of America * * * and the Cumberland Presbyterian Church * * * shall be united as one church, under the name and style of the Presbyterian Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess.

"2. The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired Word of God, the only infallible rule of faith and practice.

"3. Each of the assemblies shall submit the foregoing basis of union to its presbyteries, which shall be required to meet on or before April 30, 1905, to express their approval or disapproval of the same by a categorical answer to this question: Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired Word of God, the only infallible rule of faith and practice? Each presbytery shall, before the 10th day of May, 1905, forward to the stated clerk of the assembly with which it is connected, a statement of its vote on the said basis of union.

"4. The report of the vote of the presbyteries shall be submitted by the respective stated clerks to the General Assemblies meeting in 1905, and if the General Assemblies shall then

find and declare that the foregoing basis of union has been approved by the constitutional majority of the presbyteries connected with each branch of the church, then the same shall be of binding force, and both assemblies shall take action accordingly."

This report was adopted by each General Assembly, and by two-thirds vote of each the basis of union was referred to the respective presbyteries for approval. A majority of the presbyteries of each church voted approval of the basis of union, thus submitted, and so reported to the respective General Assemblies in 1905, and by vote of both General Assemblies it was declared to have been adopted. The committees of each General Assembly were continued for the purpose of arranging the details of the union, and their action was jointly reported to each assembly in 1906 and adopted by each. Each assembly by a majority vote then declared the union to be consummated.

The first question to decide is whether or not the Cumberland Church had the power to unite with another church, and of this we readily conclude that such power existed. Nothing appearing in its Constitution to forbid, we are of the opinion that it possessed the inherent power so to do. Judge Neil of the Tennessee Supreme Court, in delivering the opinion of that court in a case involving the same questions now before us, so well expressed the views on this subject which meet our approval that we cannot do better than quote what he says. Though we are unable to reach the same conclusion that he did on the whole case, we find much to be commended in his opinion. He said this:

"In Christian thought, unity is more desirable than division. All denominational church organizations have as their primary object the propagation of the Christian religion. The individual advancement of each separate organization is looked upon as a contribution that far to the general cause. A union with another church organization having the same purpose may be regarded, therefore, as a step forward in the consummation of the work in which all are engaged. For this reason the general analogy of any secular corporation or association is misleading. The purpose of such an organization is self-aggrandizement, the advancement of its own interests, its increase in

power, in wealth, in strength, without regard to any other organization, to the prosperity or purposes of any other association of individuals. Such organizations have no common purpose, no common head, no invisible cords of union. Each stands alone. Each has property devoted to the special individual purposes of the society, and each has stockholders. A business corporation is organized for profit; and if its life is not limited by its charter, it is regarded as perpetual unless sooner ended for breach of law or duty, or inability to discharge its functions. In case of a termination of corporate rights by efflux of time, or for either of the causes last mentioned, the business is wound up, the property is sold, and the proceeds, after payment of debts, if any, divided among the stockholders. But with church organizations it is different. They are not created for either profit or pleasure, but to do good. They have property, but no stockholders. The possession of all churches are devoted to the same broad, general purpose, likewise the efforts of all of their members acting within the organizations. * * *

"There must be in every church organization an implied or inherent power of union with other church organizations, growing out of the purpose for which all are constituted, viz.: the dissemination of the Christian religion. If any two organizations reach the conclusion that they can better subserve this great and fundamental purpose by uniting with each other, and if they can agree, within their constitutional limits, upon the points of difference previously dividing them, there can be no reason, in law, why they should remain apart. There is no soundness in the view that church divisions, once made, must ever continue. If divisions in the Christian church were intended to be perpetual, then the argument for the defendants, on this head, is unanswerable; if there be such a thing as a universal church of which all the divisions are members or branches, if there be a tendency to unity in Christendom, and if this tendency is in accord with the spirit and purpose of Christianity—then the argument referred to can avail but little. * * *

"The power exists by implication. It exists from the very nature of the case, not only in the Cumberland organization, but in every other Christian society in whose standards there

is not an explicit pronouncement to the contrary, because they are all parts of one whole, all engaged in the same work, seeking the same end, and animated by a common purpose. But, although the power to form a union exists, it must be exercised in accordance with the manner indicated by the Constitution or consistent contract by which the organization is bound together."

The Indiana Supreme Court, in *Ramsey v. Hicks, supra*, reached the same conclusion expressed as follows: "It is our conclusion that the Cumberland Church had inherent power to unite with another ecclesiastical body whose doctrine and policy were deemed in harmony with its own, and that the authority to consummate such union was vested in its General Assembly, without the direct sanction of its lay membership; that that body did not usurp authority or transcend its powers, and, so far as this court has jurisdiction to pass upon that question, the reunion and union of that church with the Presbyterian Church, as declared by the General Assembly at Decatur, Illinois, was legal and valid, and binding alike upon its membership and upon the civil courts."

We are of that opinion, too. We think there was an implied or inherent power in the Cumberland Church to unite with another church whose faith should be found to be in harmony with its own. Moreover, there is ample express authority contained in the Constitution of the church for changing the doctrines so as to bring them into harmony with those of other churches; this, of course, under the implied limitation that the change should not be so fundamentally radical as to pass the reasonable bounds which the framers of the Constitution must be deemed to have had in contemplation. Instead of there being anything in the constitution of the church forbidding union with another church, there is a clear implication from the language of that instrument that such power existed, for it contains provisions broad enough to embrace that power and to point out the method of its exercise. Section 60 provides that, "upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof, voting thereon, the Confession of Faith, Catechism, Constitution and Rules of Discipline may be amended or changed when a majority of the presbyteries, upon the same being submitted for their action, shall

approve thereof." How could language be broader, or express greater power? It says that "*the Confession of Faith, Catechism, Constitution, and Rules of Discipline may be amended or changed*" by the General Assembly and presbyteries in the methods pointed out. This covers everything which a church stands for—everything which justifies the separate existence of a church—doctrine, form of government and mode of worship. Even a change of name and separate identity falls within the wide sweep of this power.

But, if it did not expressly include the power to change the name and identity, what is there in the name and identity of a church which should stand in the way of a union of two churches having the same faith and mode of worship? Church organizations are not brought into being, like commercial corporations and purely social or fraternal organizations, for the purpose of preserving separate denominational identity. Churches merely represent the coming together of people sharing the same religious beliefs, or preferring the same mode of worshipping Almighty God, and name and separate identity are mere incidents. The only real lines of separation between churches are the differences in belief; and when these become harmonized, the lines of separation marked by distinct organizations remain as but shadows, without substantial justification.

Presbyterian church government is representative in form. Neither the constituent churches nor the members thereof legislate directly for themselves. The congregation of a church only elects the ruling elders who compose the church session, and the session in turn selects one of its members as a representative in presbytery. The sovereignty of the church is exercised by the General Assembly and the presbyteries acting together, the Assembly proposing legislation and the presbyteries approving or disapproving. They act for the whole church, and the will of a majority of all the presbyteries, acting with the General Assembly, expresses the will of all the particular churches. It is essentially a government of the majority. All things which are done by the church as a whole are, according to the letter of the Constitution, done by the Assembly and presbyteries, and all of the inherent powers of the church as a whole reside in those representative bodies. They constitute the residuum of all the powers,

executive, legislative and judicial, not expressly lodged elsewhere by the Constitution. Therefore, when the union was decreed by those bodies, the will of the whole church was spoken.

We again quote from the opinion of Judge Neil of the Supreme Court of Tennessee: "The Cumberland Presbyterian Church is a compact organization. Each individual congregation is bound to the presbytery over it by the fact that before it can become a Presbyterian congregation it must be received by the presbytery, and it cannot obtain a minister except by the consent of the presbytery, or make a contract with him; and when the contract is made by the consent of the presbytery, it cannot be dissolved except with like consent. There can be no doubt that if a congregation should refuse to obey this rule, or law, it would, during the continuance of such disobedience, be in a state of rebellion against lawfully constituted authority, and could be properly excluded from the body of the church. There can be equally no doubt that if a minority of the congregation, in such a case, should be willing to submit to the authority of the presbytery, it would be recognized by the civil authorities as the true congregation, and would be entitled to the possession and use of the church property. * * *

"The General Assembly then is made up of representatives of the people, that is, elders and representatives of the church at large, that is, ministers. Thus it is composed of all governing agencies. The sovereignty of the organization, however, does not reside in that body alone, or in the presbyteries, but in it and the presbyteries; each acting alone is limited to powers expressly given (Const., Sec. 25); when they act together, the whole governing body acts, the church at large, and the people themselves in and through their elders, who are the representatives of each several church. The power which makes or amends the Constitution, or constituent contract of the organization, is the power where sovereignty is lodged. This power is that of the General Assembly and the presbyteries acting together. * * *

"It may be for the good of the church, under some circumstances that may be conceived, to dissolve the organization, or to unite with another church on such terms as may be agreed upon. Such union may involve a change of name, or faith, or both. The constituent contract, the constitution, may point out

how both of these ends may be effected, and, if so, must be complied with. After these changes have been made, there may still remain the organization, the framework, of the church, which must, in effect, be dissolved by the act of union with another church. The authority to effect this must be found where the supreme legislative power of the organization resides, because it requires the exercise of the will, and the expression of the will of the whole organization as a unit, on a proposition affecting the whole in respect of its existence and organic activity. There being a question for the whole church, it cannot be a matter to be determined by the individual congregation. The whole church itself is a unit, a composite unit, it is true, but still a unit; and in determining questions addressed to it, it must act in accord with its nature, by that body or bodies through which it speaks its will."

The California court spoke as follows on the subject: "The evidence shows that in Presbyterian usage from its beginning all church power has been uniformly and universally considered and understood to be vested in the presbyteries and assembly. See *Fussell v. Hail*, 134 Ill. App. 634. The presbytery is the recognized church unit, and has a voice in affairs of this character. The assembly consists of representatives of the several presbyteries, and, as the Cumberland Constitution states, it is the 'bond of union' between them and 'represents in one body all the particular churches.' It declares and executes, for the whole church, the orders and judgments of the presbyteries expressed through their representatives assembled in and constituting the assembly. The highest governmental powers are always exercised and declared by their joint action in this manner, before any written constitution had purported to confer the authority upon them to do so. * * * The Presbyterian government is wholly representative in character. It has no characteristics of a pure democracy. The members exercise their will in such affairs, so far as they may under the Presbyterian system, in choosing the ruling elders, in selecting one of them as a representative to the presbytery, and in exerting their personal influence upon the ministers and ruling elders, by which means they doubtless frequently secure their desires. This government by representatives being the recognized rule of the church to which the members consented

when they joined, it cannot be said that there has been any violation of the compact between the church and its members, or anything unfair in the method of effecting the union." *Permanent Comm. of Miss. v. Pac. Syn. Presb. Ch., supra.*

It is insisted that the respective doctrines of the Presbyterian Church and of the Cumberland Church were so radically and fundamentally different that they could not be harmonized and that no union of the two churches could be consummated.

We understand the law to be well established by the great weight of authority that on questions of church doctrine or discipline the civil courts are governed exclusively by the decisions of the church courts, or judicatories, so-called, where such courts are created and vested with authority under the constitution of a given church to decide those questions. To state the rule more broadly: Civil courts will not assume jurisdiction of controversies purely over matters of church doctrine or discipline, where no property rights are involved; civil courts will assume jurisdiction only of causes involving civil or property rights, and in such causes, when questions arise concerning matters of church doctrine or discipline which have been decided by a church court vested with such jurisdiction by church laws, the civil courts accept as final and conclusive the decisions of the ecclesiastical court. This rule is well stated by the Supreme Court of Indiana as follows: "Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved. Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong." *White Lick, etc. v. White Lick etc.*, 89 Ind. 136, quoted with approval in *Ramsey v. Hicks, supra.*

Watson v. Jones, supra, is the leading case on this subject, and we think it announces the correct rule. Judge Miller in the opinion, said: "In this class of cases (speaking of cases which involve property rights growing out of divisions in church government similar to that of the Presbyterian system) we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and State under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the question of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. * * * The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their rights to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

It must be remembered that this was said in a case involving the right to use and control church property. In other words, a property right was involved, and the court held that in adjudicating the right of property the decision of the church judicatory would be accepted as binding on the civil courts.

Judge Lurton, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Brundage v. Dearing*, 82 Fed. 214, very fairly and forcefully announces the same rule as follows: "What effect will a civil court give to the interpretation and construction by the highest judicatory of an ec-

clesiastical body of its own fundamental law? Is that judgment subject to review in the civil courts? Or will the civil courts accept the interpretation placed upon the organic law of the church by its highest judicatory, and apply the law so interpreted to the settlement of property questions depending upon that law? As we have already stated, the property here involved was not devoted by the express terms of any grant, gift, will or sale to the support of any specific religious dogma, doctrine or belief, but is property acquired by the church for the general use of the society for religious purposes, and with no other limitation. The property here in question is held for the particular use of a congregation, which is only one of numerous others united to form a general body of churches, and subject to the ecclesiastical control of the general conference, whose jurisdiction extends to all congregations composing the general body. The question here presented is merely one of identity—which of the two bodies claiming to be the legitimate successor of the original united organization is the legal successor of the body to which this property was conveyed? When this question is answered, the property must be awarded to that organization. The decision of this question involves the interpretation of the organic law of the church in respect to the appropriate method of altering or amending that law. But that fundamental law has been construed, interpreted and applied by the highest judicatory of this church before its division, and the very changes in the Constitution and confession now complained of as irregular and revolutionary sanctioned and approved as having been made in accordance with the method prescribed by the fundamental law of the church for its own amendment. Shall we review that decision, and overturn its conclusiveness upon questions purely relative to ecclesiastical law and government, and take from the majority the general property of the church upon some difference of opinion as to whether the highest authority within the church had not mistaken the meaning of the church organic law? The question is not an open one in courts of the United States. It is the duty of this court under the law as settled to accept that decision as final and as binding upon it in so far as that decision has application to the case for decision."

It is not a fair statement of the question to say that under this view the civil courts abdicate their functions and act merely as

clerks and sheriffs to record and execute the judgments of the ecclesiastical courts. In holding to this view the civil courts merely declare settled principles of law applicable to other controversies by enforcing the compact of parties who have agreed to abide the decision of a tribunal created by themselves to settle disputed questions peculiar to the matter which is the subject of the compact. Apt illustrations of the application of these principles are found in cases involving constructions of contracts, wherein the contracting parties have agreed to submit matters in dispute concerning the quality, quantity or manner of construction of the work to engineers or supervising architects. In such cases the courts have invariably upheld such contracts and decisions rendered in accordance with their terms, unless they are subject to impeachment for fraud or gross mistake. *Ark.-Mo. Zinc Co. v. Patterson*, 79 Ark. 506, and cases cited. So with church controversies, where, by the Constitution of the church, which is the solemn compact between all its members, the matters pertaining to church doctrine or discipline are to be left to the highest church courts for decision, the decision of such questions by those courts are binding upon the civil courts when they arise in controversies involving civil rights or rights of property.

There can be no doubt that under the Constitution of the Cumberland Church the General Assembly was vested with complete power to decide questions of that kind. We find the following in the Constitution:

"Section 40. The General Assembly is the highest court of this church, and represents in one body all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and constitutes the bond of union, peace, correspondence and mutual confidence among all its churches and courts."

"Section 43. The General Assembly shall have the power to receive and decide all appeals, references and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline; * * * to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church."

Section 3 of the Confession of Faith reads in part as follows: "It is the prerogative of these courts, ministerially, to determine controversies of faith and questions of morals, to set down rules and directions for the better ordering of public worship of God and government of His church, * * * and authoritatively to determine the same, which determinations are to be received with reverence and submission."

Did the General Assembly of the Cumberland Church decide that the doctrines of the Presbyterian Church as revised in 1903 were in substantial harmony with the doctrines of the Cumberland Church? We think this was so decided. The General Assembly adopted the joint report of the Committee on Fraternity and Union, which declared that "such agreement now exists between the system of doctrine contained in the Confessions of Faith of the two churches as to warrant this union;" and which also declared that the revision of 1903 of the Confession of Faith of the Presbyterian Church "reveals a doctrinal agreement favorable to reunion." Besides this, the General Assembly adopted a resolution declaring "that, in the reunion and union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America on the doctrinal basis of the Presbyterian Confession of Faith as revised in 1903, the Cumberland Presbyterian Church does not surrender anything integral in its own system of doctrine as set out in its own Confession of Faith, nor modify in any particular its adherence to the Word of God as the only infallible rule of faith and practice; nor has the Presbyterian Church asked or expected us to do so."

The decision of the General Assembly as the highest judiciary of the church on the question of the substantial identity of the doctrines could not, we think, have been more distinctly enunciated. We must, therefore, treat that question as settled. Nor is there any force in the suggestion that this decision should not be held binding because it represents the decision of one faction of the church. It was the decision of the General Assembly of the Cumberland Presbyterian Church as a whole. At that time there was no division of the church, though there were factions within the church, one favoring and the other opposing union. But the General Assembly of the Cumberland Presbyterian Church as a separate organization before the union was consummated, or claimed to be consummated, made this decision,

and it was a decision binding upon the whole church as it then existed.

Since we find that the two churches each possessed the power to unite, and that the authority to consummate the union rested in the General Assembly and the presbyteries acting together in the mode specified in section 60 of the constitution, the remaining question is, was the power exercised in the constitutional mode so as to effectuate the union?

It is contended on behalf of the Loyalists that the whole plan of the basis of union was not submitted to the presbyteries—that only a portion of the plan was submitted, viz.: a union “on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards;” but that the other part of the plan, for a union of the two churches “under the name and style of the Presbyterian Church of the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess,” was never submitted to nor approved by the presbyteries of the Cumberland Church. This is one of the points on which the Tennessee and Missouri courts held the union to be invalid, and learned counsel for defendants have urged here with much earnestness that such is the correct view of that question. We cannot, however, yield assent to that view. We are not prepared to say that it was essential that the change of name should have been submitted to the presbyteries, if the other points of the basis of union were properly submitted to and approved by the presbyteries. If all else was approved by the presbyteries in the constitutional mode, and the union properly arranged on the agreed doctrinal and ecclesiastical standards, it would seem that the General Assemblies of the two churches had the power to choose a name for the united churches. We will not go into a discussion of that question, for it is clear to us that the whole plan of the union was in fact submitted to and approved by the presbyteries.

It will be observed that this plan of union reported by the joint committee and adopted by the assembly, prescribed the mode of its submission to the presbyteries. Section 3 provided that the plan should be submitted to the presbyteries by requesting a categorical answer to the question therein propounded. A

resolution was adopted instructing the moderator and stated clerk of the assembly to submit the plan of union to the presbyteries, and this was done in the form of a circular letter, sent out by the moderator and stated clerk in the following form:

"To the Presbytery:

"Dear Brethren: By referring to the minutes of the last meeting of the General Assembly (pages 25, 55a, 30, 44, 48), you will see that, in the constitutional manner, the assembly has submitted to the presbyteries a proposition pertaining to the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, and you are asked to give due consideration to the same and vote thereon. This proposition is to be put before the presbytery in the following terms:

"Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards, and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired Word of God, the only infallible rule of faith and practice?"

"To this question the presbytery is to give categorical answer. While the vote is taken simply upon this question, your action thereon will mean the acceptance or rejection of the entire plan, embracing the basis of union, concurrent declarations, and recommendations, without amendment or alteration in any part." (See minutes, pages 62a, 65a.)

"For the information of the presbyteries, the amendments to the Westminster Confession of Faith and the brief statement of the reformed faith have been printed in the assembly minutes. (See pages 72-77.)

"The vote of the presbytery is to be taken on or before April 30, 1905, and the accompanying certificate of the vote is to be returned to the assembly's stated clerk before the 10th day of May, 1905.

"W. E. Settle, Moderator.

"J. M. Hubbert, Stated Clerk.

"Marshall, Mo., September 6, 1904."

What more was needed to bring the whole plan before the presbyteries for their approval or disapproval? It was as if the assembly had said to the presbyteries: "Here is the whole plan of union set forth in four sections; signify your approval or disapproval of the whole plan by answering categorically the question propounded in the third section." Is it conceivable that the ministers and members composing the presbyteries did not understand, when they voted an answer to the question set forth in the letter of the moderator and stated clerk, that they were approving or disapproving the whole plan of union on the basis of taking the name and adopting the doctrinal and ecclesiastical standards of the Presbyterian Church? We think not. To so hold would be to attribute to the presbyters a degree of intelligence far below the average of mankind in this country. The submission letter not only referred to the whole plan, but cited the pages of the minute book of the assembly where it could be found, and called attention to the fact that the answer of the presbyteries to the one question set forth would mean acceptance or rejection of the whole plan.

The proceedings were not conducted along technical lines, and should not be subjected to a technical scrutiny which would defeat the obvious intention of those who participated. The presbyters are presumed to have been men of at least average intelligence; and it is also to be presumed that they possessed themselves of all the facts concerning the whole plan of union and the effect of the votes which they were called on to cast. Nothing, it seems to us, could be plainer than the manner in which the plan was submitted, and we are unwilling to say that it was or could have been misunderstood by the members of the presbyteries. We say that the whole plan was submitted to and adopted by the presbyteries.

It has been suggested that, while it was within the power of the assembly and presbyteries, acting under section 60 of the constitution, to amend or change the doctrines of the church so as to bring them into harmony with those of another church, and then to unite with that church, both powers could not be exercised at the same time; in other words, that the doctrines must first be changed so as to harmonize with those of the church with whom the union is sought, and then separate proceedings be taken

to effect a union. We do not think this position is tenable. In the first place, it is sufficient answer to this to say that, according to the decision of the General Assembly on the ecclesiastical question, which we hold is binding on the civil courts, no substantial change was made in the doctrines of the Cumberland Church. When the Presbyterian Church in 1903 revised its Confession of Faith, not changing, it maintained, but expounding or elucidating its doctrines so as to dispel the fatalistic construction placed on them by some other churches, the General Assembly of the Cumberland Church decided that those doctrines as thus revised or expounded were in substantial accord with the doctrines of the Cumberland Church. Therefore, no change was made in the doctrines of the Cumberland Church, according to the decisions of its highest judicatory. It simply adopted the doctrinal standards of the Presbyterian Church, which were found, after the so-called revision of 1903, to be in substantial accord with its own.

But, even if it be conceded that the act of forming the union involved a change in the doctrines of the Cumberland Church, both could be accomplished by one vote. If the church, acting through the assembly and presbyteries, had the power to change its doctrinal standards and form a union with another church, both could be done at one and the same time and by the same vote, if both questions were properly submitted. Until the union became actually consummated, each of the churches preserved its separate identity, and remained in the exercise of its sovereign power, and could decree a union at the same time that it changed its doctrine. Both questions could be determined at the same time.

It is unimportant, so far as it affects the validity of the union, whether the name and doctrinal standards of the Presbyterian Church had been adopted, or whether those of the Cumberland Church had been adopted, or whether some other name and other harmonious doctrinal standards had been adopted. The result would have been the same, for, if the churches had the power to unite, they could have adopted any name and any doctrinal standards found to be in harmony with their own. A union would have been the result in either case which it was within the power of the churches to effectuate.

We discover no force in the refined distinctions sought to be

made between union and merger and absorption. Absorption results in union, and the Cumberland Church had the power to unite with the other church by adopting the latter's name and doctrinal standards so as to become merged into the other organization.

We conclude, therefore, that the union between the two churches was legally consummated, and the Unionists must succeed in this controversy. The decree below should have been in their favor.

We have not cited all the authorities bearing on the question, though we have examined them in an effort to give the case the careful consideration demanded by the great interests involved, contenting ourselves with citation of the cases in other States concerning this particular controversy as to the validity of the union. The opinions in those cases refer to all the authorities, and leave little to be said on the subjects discussed. We have attempted no more than a restatement in different form, as briefly as found practicable, of the controlling principles of law so ably discussed in those opinions. The opinions of the intermediate appellate courts which considered those questions have also been found helpful in arriving at a conclusion. *Clark v. Brown*, 108 S. W. (Tex. Civ. App.) 421; *Ramsey v. Hicks*, 89 N. E. (Ind. App.) 597.

The decree of the chancellor is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

WOOD and HART, JJ., dissent.

HART, J., (dissenting) My only reason for filing a dissenting opinion in this case is to give a brief summary of the views which prompted my disagreement with my brother judges. I shall not attempt any citation of authorities; for all the cases bearing directly on the question at issue have already been cited in the majority opinion, and the interested reader will find that the various opinions and dissenting opinions already delivered have exhausted the subject. I shall say nothing concerning the desirability of church unity; for that I consider a matter for the churchmen and not for the civil courts.

The Cumberland Presbyterian Church has a representative form of government. It has adopted a written constitution, and

a careful consideration of the instrument leads me to the conclusion that it is one of granted powers. Certain ecclesiastical bodies, commonly called church courts, are created, and upon them are conferred certain executive, legislative and judicial functions.

Section 25 of the Constitution specifically names the church courts created and prescribes the limits over which each may exercise jurisdiction, and concludes as follows: "and the jurisdiction of these courts is limited by the express provisions of the constitution." Other sections of the constitution specifically enumerate the powers, whether executive, legislative or judicial, of each of the church courts; and reference must be had to that instrument for any authority which each of these courts may assume to possess. The constitution must be considered as a whole, and each section read in connection with others relating to the same subject.

Bearing in mind these settled rules of construction, I have examined the organic law of the Cumberland Presbyterian Church, and have been unable to find any section or part thereof which has, in express terms or by necessary implication, conferred upon the church courts or judicatories the power to dissolve the church and to form a union with another religious society.

Section 43 of the constitution defines the powers and prescribes the jurisdiction of the General Assembly, and it is certain that no such power is expressly granted by that section. Nor do I think such power can be impliedly conferred by necessary implication; for in that section one of the powers delegated to the General Assembly is, "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrines and order of this church," and it is a canon of construction that the express mention of one thing implies the exclusion of another. Having expressly granted to the General Assembly the power to receive other religious bodies under its jurisdiction, and not having, in equally plain terms, conferred upon it the authority to dissolve the church, and to form a union with another religious society, it seems plain to me that such power was intentionally withheld by the framers of the constitution. But it is insisted that the power may be exercised under the authority to amend conferred by section 60 of the constitution. This argument concedes that no such power existed before; for if the

power was granted by the constitution itself, an amendment for that purpose was not necessary. Moreover, the fallacy of that argument consists in the assumption that the power of amendment confers the right to make such radical and fundamental changes in the constitution as would abrogate it and defeat the purposes for which it was adopted. The power to amend signifies the power to change or alter; but not to destroy. A constitution may be changed or altered to any extent by amendment where the purposes for which the constitution itself was intended are preserved; but the power to amend can never be used as an instrument of destruction of the constitution itself.

To my mind the reasoning of Mr. Justice Hodges, in the case of *Clark v. Brown*, (Tex. Civ. App.) 108 S. W. 421, is so clear and logical as to leave no doubt on this point. He said:

"The organization constituted by the church compact being the source from which the delegated power to amend the constitution is derived and for the continuation of which a constitution is to be maintained, the preservation of its integrity was as much a part of the duty imposed, and its destruction as much beyond the power conferred, as if there had been express stipulations to that effect. The word "constitution" signifies something constituted, and is generally used to designate the written evidence of something which can only have a legal existence. It is true that, in exercising the power of amendment, one portion of a constitution may be abrogated and another substituted, and to that extent there may be a partial destruction of the instrument as before existing contemplated in this power of amendment; but there is a clear implication, going with the power to amend, that the integrity of the instrument shall remain unimpaired. If that instrument is to be disregarded, or the powers exercised to be in defiance of its provisions, or by virtue of superior sovereignty, there was no necessity for an amendment. The very fact that powers and duties are to be defined through the instrumentality of an amended constitution carries with it the suggestion that the constitution is to be the source from which the power is to come, and that the government which it creates shall continue to be subject to its requirements. There is in this provision of the constitution requiring the joint acts of the General Assembly and a majority of its presbyteries for its amendment convincing proof of the recog-

nition of this principle, and that the constitution so amended should continue in operation and govern the future management of the church until its provisions had been changed by other and different amendments made in consonance with its purposes and plan of acquisition. When the grant of the power is required to be written into and become a part of the organic law of any institution, whether political, commercial or ecclesiastical, the inference is clear that a continuation of the organic existence constituted is contemplated. If the General Assembly and a majority of the presbyteries had the power to form such union as would result in the destruction of the separate organic existence of the Cumberland Presbyterian denomination, there was no necessity for writing that power first into the constitution before it could be exercised; for by its exercise alone the constitution as amended would be wholly and effectually abandoned. Aside from the power of amendment given in this section, the constitution nowhere undertakes to prescribe the joint duties of the General Assembly and the presbyteries. On the contrary, the powers of each of the different church courts are treated separately, thereby showing an intent to limit the powers of each to such as had been prescribed, and to prevent any enlargement of either except by the consent of the other church courts."

I am, however, of the opinion that the Cumberland Presbyterian Church had the inherent power to form a union with another church. This right is justified upon the same principles upon which, in the first instance, the church was organized. It is a voluntary religious association, and as such it has, under our laws, the same right to dissolve itself and to form a union with another religious society as it had to organize in the beginning. By inherent power is meant "an authority possessed without its being derived from another." The church courts being bodies of delegated powers, it is obvious that they possess no inherent power. It follows that the inherent power to dissolve and to form a union with another religious society rests in the body of the church itself; and, no provision having been made for its exercise, it can only be done by the unanimous consent of the units of the church. If I am correct in my position that the written constitution of the church can not be amended so as to give the church courts the power to dissolve the church and to

form a union with another church, it is equally certain that such courts can not usurp the power reserved in the body of the church to accomplish such purpose. So long as sufficient church units preserve the church organization and are capable of enjoying its ecclesiastical and property rights, I think they are entitled to the use and property belonging to the Cumberland Presbyterian church.

The views I have expressed renders it unnecessary for me to express an opinion on the binding force of the decisions of ecclesiastical courts upon the civil courts; for it is evident that, if the ecclesiastical court has no power to make its decision in the first instance, it can have no binding effect whatever. It is a well established principle of construction that the decision of a court without jurisdiction is void and of no effect.

Mr. Justice WOOD concurs.

GARDNER *v.* STATE.

Opinion delivered October 17, 1910.

1. **APPEAL AND ERROR—TIME FOR TAKING IN CRIMINAL CASES.**—Under act of May 6, 1909, providing that "no appeal to the Supreme Court in a criminal case shall be granted, nor writ of error issued, except within sixty days after rendition of the judgment of conviction in the case," the time prescribed by the statute for taking an appeal runs from the rendition of the judgment of conviction and not from the overruling of the motion for new trial. (Page 146.)
2. **SAME—CAPITAL CASES—REVIEW.**—Under act of May 31, 1909, regulating the practice in the Supreme Court in capital cases, upon a conviction of a capital offense no exception to the decision of the lower court, nor motion for new trial is necessary to review an alleged error, but a bill of exceptions is still necessary in order to bring upon the record the proceedings which are otherwise not a part thereof. (Page 147.)
3. **SAME—CAPITAL CASE—REVIEW.**—Though act of May 31, 1909, renders the filing of a motion for new trial unnecessary in capital cases, a bill of exceptions is still proper to bring upon the record the oral proceedings and instructions of the court, which are otherwise not a part thereof. (Page 147.)
4. **SAME—FILING BILL OF EXCEPTIONS AFTER APPEAL OR ERROR.**—Where a bill of exceptions was signed by the trial judge and filed as a

part of the record after an appeal or writ of error was granted, it will be treated in the Supreme Court as part of the record and considered in the review of the case. (Page 148.)

Error to and appeal from Logan Circuit Court, Southern District; *Jeptha H. Evans*, Judge; appeal dismissed.

J. H. Carmichael, for appellant.

Hal L. Norwood, Attorney General, and *William H. Rector*, assistant, for appellee.

PER CURIAM. Will Gardner was convicted in the circuit court of Logan County of the crime of murder in the first degree, the judgment of conviction being rendered on January 28, 1910. On that day, without any motion for new trial being filed or further proceedings had in the case, the court adjourned over until July 30, 1910, for a continuation of the term. On March 22, 1910, defendant obtained a writ of error from the clerk of this court, the record of the proceedings in the lower court up to that date was filed with the clerk here, and on the same day supersedeas was issued by order of one of the judges of this court staying execution of the judgment during the pendency of the cause. Subsequently an order was made passing the case, on the defendant's request, to enable him to apply to the circuit court at the adjourned term for a new trial.

When the circuit court convened again, on July 30, a motion for a new trial was filed by the defendant and overruled by the court; and the defendant obtained leave of that court to file a bill of exceptions within sixty days, and the bill of exceptions was filed within that time. On September 28, 1910, which was within sixty days from the date of the overruling of defendant's motion for new trial, an additional transcript of the proceedings of the lower court was presented to one of the judges of this court, and an appeal was granted. The Attorney General now moves the court to dismiss the appeal on the ground that the same was not granted within sixty days after the judgment of conviction; and also moves the court to strike out the bill of exceptions, on the ground that it was not a part of the record in the cause when the writ of error was issued.

The act of May 6, 1909, provides that "no appeal to the Supreme Court in a criminal case shall be granted, nor writ of error issued, except within sixty days after rendition of the judg-

ment of conviction in the case." The time prescribed by the statute for taking an appeal runs from the rendition of the judgment of conviction, and not from the overruling of the motion for new trial. *Moore v. Henderson*, 74 Ark. 181.

The act of May 31, 1909, regulating the practice in the Supreme Court in capital cases, is as follows: "In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs or error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that any prejudicial error was committed by the trial court on the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified at the discretion of the court."

In *Harding v. State*, 94 Ark. 65, this court held that in cases falling within the terms of the act no exception to the decision of the lower court is necessary in order for this court to review an alleged error, and that a motion in the lower court for a new trial is not a prerequisite to a review of errors by this court. The court in that case did not hold that one convicted of a capital offense could not apply to the circuit court for a new trial, or that the circuit court was without power to grant it. On the contrary, it is plain that the circuit court still has the power to grant a new trial upon timely application, notwithstanding the fact that, under the above mentioned statute, it is not essential to a review by this court. The statute repeals other statutes regulating the practice in capital cases only to the extent that they are expressly or by necessary implication in conflict with the later statute. The later statute renders the filing of a motion for new trial in capital cases nonessential to a review by the Supreme Court; but a bill of exceptions is still proper, in order to bring upon the record the proceedings which are not otherwise a part of the record. This is the only vehicle by which the oral proceedings and instructions of the court can be brought upon the record.

Now, it is proper for this court to consider the whole record

in a case, even that which is perfected after the appeal or writ of error is granted. The filing of the bill of exceptions is not a new proceeding, but is merely the record of proceedings which have already transpired. It is not an uncommon practice for this court to postpone the hearing of cases in order for defective records to be corrected, or for omissions in the record to be supplied. There appears to be no sound reason why a bill of exceptions, prepared and signed by the judge and filed as a part of the record after the appeal or writ of error is granted, should not be treated here properly as a part of the case and considered by the court in its review of the case. Of course, the bill of exceptions must be filed in the circuit court within the time prescribed by the statute, which was done in the present case. The circuit court, as it had the power to do under the statute (§ 6222, Kirby's Digest), extended the time in this case for filing the bill of exceptions, and the same was filed within that time.

The appeal is dismissed, on the ground that it was granted out of time; but the case will stand for hearing on the writ of error. Motion to strike out bill of exceptions is overruled.

WILSON v. STATE.

Opinion delivered October 17, 1910.

LARCENY—SUFFICIENCY OF TAKING.—If a person takes property in good faith, under an honest belief that he is the owner, it does not constitute larceny, even though, after learning that it was not his property, he converted it to his own use.

Appeal from Sebastian Circuit Court, Greenwood District;
Daniel Hon, Judge; reversed.

Holland & Holland, for appellant.

The sixth instruction given by the court is erroneous. If the appellant took the property in good faith believing it to be his own, there was no larceny; the felonious intent to steal did not exist at the time of the taking. And if this intent did not exist at the time of the taking, its subsequent formation would not constitute larceny. 13 Ark. 168; 40 Am. Rep. 790; 55 S. W.

334; 70 Ark. 204; 69 Ark. 454; 60 Ark. 5; 34 Ark. 334. One who takes under a *bona fide* claim of right to do so is not guilty of larceny. 71 Ark. 643; 28 Ark. 126. The presumption is against larceny where the taking is open. 25 Cyc. 46, note 10; see also *Id.* 54, note 64. The taking of the property, and its possession, is not alone sufficient to raise a presumption of guilty intent, nor to sustain a conviction of larceny. 32 Ark. 328; 60 Ark. 5; 67 Ark. 155; 85 Ark. 360.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

No error in the sixth instruction. There could be no criminal conversion so long as appellant actually believed the property was his own; but when he discovered it was the property of another, that moment, if he converted it to his own use, he became guilty of larceny. 126 S. W. 1018; 1 McLain, *Crim. Law* § 570; 38 S. C. 348.

MCCULLOCH, C. J. Appellant was convicted of the crime of grand larceny in stealing a bull alleged to be the property of one Chapman. He took the bull from the range, claiming it to be his own which had strayed away, and kept it several months in his son's pasture. Chapman heard of the bull being in his pasture, and laid claim to it, but appellant refused to give it up. Appellant afterwards sold it to a butcher, who killed it, and this prosecution was begun against appellant for stealing the bull.

At the trial of the case, appellant and Chapman both introduced testimony tending to establish their respective claims of ownership. The testimony was sufficient to have warranted a finding of the jury either way on that issue, and also that the appellant took the bull from the range, and afterwards converted it to his own use under an honest belief that it was his own property. The court gave, over appellant's objection, the following instruction No. 6:

"If he took it honestly believing it was his, and learning afterwards that it was not his property, and converted it to his own use with the felonious intent to deprive the owner of it, when he knew it was not his own property, he would be guilty."

If a person takes property in good faith, under an honest belief that he is the owner, it does not constitute larceny, for the felonious intent is lacking. The felonious intent must, in order

to constitute larceny, exist at the time of the taking; and a subsequent formation of such an intent is not sufficient. So, if the taking is under an honest belief of ownership, there being no felonious intent to steal at that time, the fact that such an intent is formed after ascertaining that another person is the true owner does not make it larceny. *Rapalje on Larceny and Kindred Offenses*, § 23; *People v. Miller*, 4 Utah 410; *Beckham v. State*, 100 Ala. 15; *Beatty v. State*, 61 Miss 18; *Billard v. State*, 30 Tex. 367; *Lamb v. State*, 40 Neb. 312.

By some courts it has been held that, if the original taking was a trespass, followed subsequently by a wrongful conversion of the thing taken, the intent to steal need not, in order to make it larceny, have existed at the time of the taking, because, in contemplation of law, as it is said, "a tortious taking does not divest the possession of the owner, but a subsequent conversion by the taker has such effect, and will, therefore, constitute larceny when accompanied by a felonious intent." Conceding this to be the correct rule, it cannot be extended so as to apply to one who takes property in good faith under an honest belief of ownership, for in this there is no element of a wilful trespass, even though there be a subsequent conversion with knowledge of the true ownership.

It follows, therefore, that the court erred in its instruction, and for this reason the judgment should be reversed, and the cause remanded for new trial. It is so ordered.

BUFORD v. BRIGGS.

Opinion delivered October 17, 1910.

1. **APPEAL AND ERROR—REVERSAL—RESTITUTION.**—Where land belonging to a partner was sold under decree in favor of an individual creditor during the pendency of an appeal by a copartner who claimed a superior equity in the land, and the copartner paid into court a sum sufficient to redeem the land from such sale, upon a subsequent reversal of the decree, the copartner will be entitled to restoration of the fund which he paid to redeem the land. (Page 152.)
2. **PAYMENTS—RIGHT TO RECOVER—WHEN NOT VOLUNTARY.**—The rule that money paid voluntarily cannot be recovered has no application to

a payment by one to redeem from a judicial sale land in which he claims an equity. (Page 153.)

3. **SAME—WHEN RECOVERABLE.**—The rule that money voluntarily paid cannot be recovered has no application to a case where money was paid to the clerk of the court to redeem from a sale under a decree which was reversed on appeal while the money remained in the hands of the clerk. (Page 153.)

Appeal from Polk Chancery Court; *James D. Shaver*, Chancellor; affirmed.

Richard M. Mann, for appellant.

1. A payment of a judgment, voluntarily made, cannot be recovered, even though the judgment be afterwards reversed. The rule is well stated that when a person without mistake of fact or fraud, duress, coercion or extortion, pays money on a demand which it not enforceable against him, the payment is deemed voluntary and cannot be recovered. 86 Ark. 175; 72 Ark. 555; 49 Ark. 70; 34 S. W. 173; 105 S. W. 286; 118 Pa. St. 455; 4 Am. St. Rep. 606; 38 N. W. 847; 62 N. W. 22; 75 N. W. 642; 86 N. W. 30.

2. The decree of July 26, 1909, is conclusive of all the rights and defenses interposed or which could have been interposed at the time, and Briggs was bound thereby and estopped from now claiming the funds which were paid to redeem the land. 77 Ark. 379; 79 Ark. 185, 194; 57 Ark. 500; 76 Ark. 423.

W. Prickett and Pole McPhetrige, for appellees.

1. Cases cited by appellant to support the contention that money voluntarily paid cannot be recovered are not in point. Here there was no payment, but a mere tender through the clerk, which appellant refused to accept. The clerk was not his agent. 72 Ark. 555.

2. The decree of July 26, 1909, was interlocutory. 1 Black on Judgments § 21; *Id.* 32. Not being final, the court had jurisdiction to amend or vacate it.

3. If the deposit by Briggs be held to have been a payment, and voluntary, yet, if it was done under a mistake, or ignorance of an essential fact, is voidable. 34 Fla. 471; 19 Conn. 548; 11 O. 223.

McCULLOCH, C. J. Appellant Buford instituted an action in the chancery court of Polk County against J. A. Lewis and

his wife, Mary F. Lewis, and also appellee Briggs, to set aside certain conveyances alleged to be fraudulent and to subject the property conveyed to the satisfaction of his (appellant's) judgment against Lewis. Among the other conveyances involved in the litigation was a deed of Lewis to his wife, conveying his interest in a lot in the city of Mena, the title to which stood in the name of Lewis & Briggs, who were copartners in the meat business.

Among other defenses in that suit, Briggs alleged that the lot in question was partnership property, purchased with partnership funds, and that on settlement of the partnership accounts Lewis was indebted to him in the sum of \$1,452. The chancery court denied the relief prayed for by Briggs, and entered a decree in favor of Buford cancelling the deed of J. A. Lewis to Mary F. Lewis, and ordering a sale of Mary F. Lewis's half interest in the lot for the satisfaction of Buford's judgment. Lewis and Buford appealed to this court without supersedeas, and the decree was carried into execution by a sale of the property pending the appeal. Buford became the purchaser, and on confirmation of the sale the court gave a period of redemption from the sale. Lewis and wife executed to Briggs a deed conveying to him their equities in the property, and Briggs, within the specified period of redemption, deposited with the clerk of the chancery court a sum of money sufficient to cover the purchase price, interest, etc. The money was not demanded by Buford, and was never paid over to him. Subsequently, this court, on hearing the appeal of Lewis & Briggs, reversed the case, and held that the partnership accounts between Lewis & Briggs should be settled, and that Briggs's equities for payment of his claim against Lewis were superior to those of Buford.

Buford and Briggs each then filed a petition in the chancery court, claiming the redemption fund in the hands of the clerk, and asked that it be ordered paid over to them respectively. Buford claims that the fund should be paid over to him to go in satisfaction of his claim against Lewis, and Briggs claims that, as he paid the fund into court, it should be restored to him, since this court decided that his equities were superior.

The chancellor decided in favor of Briggs, and ordered the clerk to pay the fund over to him. Our conclusion is that the

ruling of the chancellor is correct, and that Briggs is entitled to restitution of the fund. On reversal of the erroneous decree, Briggs was entitled to restoration of his rights. His equities being superior, he was entitled to have his lien enforced against the property or to recover the proceeds of the sale in satisfaction of his claim. It was not merely the interest of Lewis that was sold under decree, for, according to our decision in that case, he had no interest which was liable for his individual debts until the partnership accounts had been settled. So, when Briggs paid the money in redemption from the sale, he did so to protect his conflicting claim, which this court sustained; and on the reversal of the case he became entitled to have restored to him that of which he had been deprived by the enforcement of the erroneous decree. *Haebler v. Myers*, 132 N. Y. 363.

But it is insisted that the money was voluntarily paid by Briggs in satisfaction of a decree against Lewis, and that he should not be permitted, under those circumstances, to recover it back. It was not, as we have already mentioned, paid in satisfaction of the judgment against Lewis, but was paid to protect his own rights, of which he had been deprived by the erroneous decree; and he did not pay it voluntarily, as the payment was coerced by the sale of the property, which he was compelled to redeem. Still another reason why appellant is not entitled to the fund is found in the fact that he has never received the fund from the clerk, and never demanded it until after the reversal of the erroneous decree in his favor. The fund remained unclaimed in the hands of the clerk until this court decided that appellant was not entitled to satisfaction, as against the claim of Briggs, out of the proceeds of the sale of the lot. As the fund was still within the control of the court, there can be no just complaint at the action of the court in awarding it to him who was entitled to it *ex aequo et bono*. *Larrimer v. Murphy*, 72 Ark. 552.

The decree of the chancellor is correct, and the same is affirmed.

ROSS v. ROGERS.

Opinion delivered October 17, 1910.

1. **INSURANCE—BENEFIT ASSOCIATION—CHANGE OF BENEFICIARY.**—The beneficiary of a policy in a mutual benefit association, whose by-laws provide that any member in open lodge may ask for the change of the name of the beneficiary in his policy, has no vested estate therein. (Page 155.)
2. **SAME—BENEFIT ASSOCIATION—CHANGE OF BENEFICIARY.**—Where the bylaws of a mutual benefit association authorized a change in beneficiaries, and the association made a change upon the application of the insured, it is estopped from questioning the validity of the change. (Page 155.)
3. **SAME—BENEFIT ASSOCIATION—METHOD OF CHANGING BENEFICIARY.**—Where the by-laws of a mutual benefit association provide that any member in open lodge may ask for a change of the name of the beneficiaries in his policy, and a member applied to the association, by written communication which was delivered in open lodge, and was accepted and acted upon by the association, the original beneficiary is not authorized to complain of the method by which the change was effected. (Page 156.)

Appeal from Pulaski Circuit Court, Second Division; *F Guy Fulk*, Judge; reversed.

Jones & Price, for appellant.

1. The record of the lodge was sufficient evidence of the fact that a change of beneficiary was asked for and granted. In the absence of an allegation of fraud, oral testimony was not admissible to show whether or not the change was really asked for. 127 S. W. (Ark.) 974.

2. The by-law of the order, providing that a member may, in open lodge, ask for a change of the beneficiary, etc., is designed for the protection of the lodge, is directory merely, and the manner of asking for the change of beneficiary, if not in strict compliance with the by-law by making the request in open lodge, may be waived by the lodge. Bacon, Ben. Soc. § § 307, 308; 60 Tex. 532; 86 Ky. 136; 5 S. W. 385; 109 Me. 560; 19 S. W. 25; 29 Cyc. 133; *Id.* 135; 37 Ill. App. 628; 204 Pa. 470; 203 Pa. 269.

Nelson H. Nichols and *Bradshaw, Rhoton & Helm*, for appellee.

A society has the power to prescribe the mode in which a change of beneficiary shall be made, and the adoption of one

method excludes all others. 18 Mo. App. 189; 110 Ia. 642; 114 Mo. App. 191; 171 N. Y. 616; 153 Mass. 314; 208 Pa. St. 101; 90 S. W. 526; 94 Pac. 132. A material deviation from the method prescribed will invalidate the change. 34 Mont. 357. The change must be in strict conformity with the laws, must follow the rules of the association, even though it does not object. 42 Ore. 63; 36 Ore. 501. Neither motive nor ignorance is material where the member did not follow the prescribed mode. 28 Utah 505; 33 Fed. 11.

HART, J. This suit was commenced in a justice of the peace court by appellee against appellant to recover the sum of \$225 alleged to be due her on a policy of life insurance. The justice rendered judgment in favor of appellants. On appeal to the circuit court, there was a trial before a jury, and the court directed a verdict in favor of appellee. From the judgment rendered, an appeal has been duly prosecuted to this court. The facts, so far as material, are as follows:

On the 14th day of January, 1906, the St. Mark Lodge, United Brothers of Friendship and Sisters of Mysterious Ten, a fraternal insurance corporation, organized under the laws of the State of Arkansas, issued a policy of life insurance for \$225 to one of its members, Philip Jones, in favor of Emma Rogers. In December, 1908, upon the written application of said Philip Jones, the beneficiary named in the policy was changed from Emma Rogers to Lucy Ross, and, as changed, the policy was in force at the death of the insured, which occurred some time during the following January.

The by-laws of the association contain a provision that any member in open lodge may ask for the change of the name of the beneficiaries in his policy, and that the secretary shall change the name and keep a record of the same.

In the case of *Beasely v. Mutual Aid Association*, 94 Ark. 499, this court held that the beneficiary in a policy of this kind had no vested rights therein. To the same effect, see *Strickland v. Strickland*, 87 Ark. 131. Hence the only question which affects the rights of appellee in this case is whether or not there has been an actual change of beneficiaries before the death of the insured.

The records of the association show that such change was made before the death of the insured. The insured, according

to the testimony introduced by appellee, applied to the company by a written communication to change the name of the beneficiary in his policy, and designated the person whom he wished to be substituted. This communication was delivered to appellant company in open lodge, and was accepted by it. The company thus recognized his right to change the beneficiary, and accepted this method of doing so. Whether the change is strictly according to the by-laws is immaterial. The by-laws authorized the change, and the change was made by defendant company on the application of the insured, and the company now is estopped from questioning the validity of the change. *Beasley v. Mutual Aid Assn. supra*; *Smith v. Metropolitan L. Ins. Co.*, 222 Pa. 226, 20 L. R. A. (N. S.) 928.

Appellee, having no vested right in the policy, could not question the method by which the change of beneficiaries was made. She was only interested in the question of whether or not a change had actually been made.

It follows that the court erred in directing a verdict for appellee, and for this error the judgment must be reversed, and the cause will be remanded for a new trial.

THOMAS COX & SONS MACHINERY COMPANY v. FORSHEE.

Opinion delivered October 17, 1910.

1. APPEAL AND ERROR—WAIVER OF OBJECTION.—An objection on account of the introduction of testimony will not be considered on appeal if no exception was saved to its introduction. (Page 162.)
2. SAME—HARMLESS ERROR.—A reversal will not be granted for errors which are not prejudicial to the rights of the complaining party. (Page 162.)
3. TENDER—WHEN NECESSARY.—No tender of performance of a contract is necessary where the contract has been definitely repudiated by the other party, as by a refusal to accept delivery if tendered. (Page 162.)

Appeal from Pike Circuit Court; *James S. Steel*, Judge; reversed.

STATEMENT BY THE COURT.

This is an action brought by Thos. Cox & Sons Machinery Company, a domestic corporation, against J. R. Forshee, J. W. Brock, D. Geiser and J. C. Bullard to recover the sum of

\$699.68 and the accrued interest, alleged to be due upon a promissory note.

The defendants answered and admitted the execution of the note sued on, but averred that it was executed upon certain conditions, which will be set forth in the statement of facts, and which they say were never performed; and that, for this reason, the note never became a binding obligation. The defendants also interposed a counterclaim which, for the reasons hereinafter given, it is not necessary to abstract.

The plaintiff introduced the note sued on, and rested. The defendants then adduced evidence in effect as follows: The Forshee Lumber Company was a domestic corporation, and in May, 1907, purchased from the Thos. Cox & Sons Machinery Company, the plaintiff herein, which is also a domestic corporation, certain saw mill machinery, which was delivered to it; and for the payment of which it executed certain promissory notes, in which it was agreed that the title to the machinery should remain in the vendor until it was paid for. At the time of the purchase the defendant, J. R. Forshee, was president and general manager, and conducted the negotiations on behalf of his company. In August, 1907, the defendant J. W. Brock succeeded him. In September, 1907, S. T. Poe, an attorney and agent, came to see him in regard to the payment of the first note, which was due and unpaid. There was a meeting of some of the stockholders, to discuss the advisability of calling a stockholders' meeting to make an assessment to pay this note, there being no funds on hand with which to meet it. All the defendants, who were stockholders of the Forshee Lumber Company, and S. T. Poe, the agent and attorney of the plaintiff company, were present at the meeting. Poe was making pressing demands for the payment of the first note which was overdue. Thus far there is no dispute in the testimony.

J. W. Brock testified in substance as follows: The Forshee Lumber Company was a corporation. I was a stockholder in the Forshee Lumber Company until the meeting the 1st of August, 1907, when I was elected general manager of the company. J. R. Forshee had been manager prior to that time. I was engaged in the lumber business. The company was incorporated in April or May, 1907. I had nothing to do with the buying of the ma-

chinery from the plaintiff. I had a conversation with Sam T. Poe in September, 1907, in reference to the installments which he claimed to be due the Cox Machinery Company. At that time I was general manager of the lumber company. The particular thorn in the flesh was \$500 due on this machinery, and \$200 due for supplies. I met Mr. Poe at Antoine, and he came on to Delight with me. I did not have the money to make these payments then. I had written the stockholders to meet me at Delight that day in an informal meeting to decide whether we would make the assessment and pay in some on the stock, in order to pay these accounts and carry on the business. I told Poe about this arrangement, and when we got to Delight there were quite a large number of the stockholders there, so the stockholders and I agreed there that day that we would make the assessment. We decided that we would have to notify the absent stockholders before we could make the assessment, and agreed to call a regular meeting of the stockholders. Mr. Poe was there in the store and waited on the stockholders' meeting for the payment of the first installment on the machinery. He wanted me and some others to give personal notes for the amount, but I told him we could not become personally liable for the debts of the Forshee Lumber Company. Then Poe said he could not carry this payment any further. We discussed the matter at some length, and some of the stockholders were present at the time. And I finally made him a proposition that if these parties would sign a note with me to stand this thing off until we could call a regular meeting of the stockholders, and if he would take possession of this machinery and turn it over to me if the stockholders failed to assess and pay the amount, I would pay the amount, if he turned the machinery over to me, and that I would take up the contract and pay the price agreed to be paid by the Forshee Lumber Company, and Mr. Poe agreed to do that under the condition that this note would be security if Mr. Poe took possession of the machinery and delivered it to me, and not before. The other parties that signed the note were present when this agreement was reached. This note was to be void if the company took up the installment; but if the company did not pay this amount, we would not be liable on this note until Mr. Poe took the machinery from the Forshee Lumber Company and turned it over to me.

The machinery was never turned over to me. It was sold at a receiver's sale.

The other defendants testified substantially the same as J. W. Brock.

In rebuttal, the plaintiff introduced S. T. Poe, who testified substantially as follows: After I had discussed with Mr. Brock and the other directors of the Forshee Lumber Company who were present the matter of their making this payment, the following agreement was reached: That this note would be executed for the cash payment on the machinery, which represented \$500 and the \$199.68 for supplies that were sent them and were supposed to have been sold for cash. Mr. Brock says that machinery was worth enough to pay that debt; and if they would take hold and take up that amount for the Forshee Lumber Company, why the Forshee Lumber Company can pay it when they make the assessment. I stated in response to that: "That is true. Why don't you take up the proposition yourself," and he said: "Well, the Forshee Lumber Company is not ready to give it up now if they can pay it, and we do not want to give it up at all," and I said: "Well, if you will fix a way for us to get our money, that is what I am looking for." I said: "My information is that four of the stockholders of the concern are worth the money; and if you folks will give me a note for the cash payment, including this account, and let the Forshee Lumber Company execute these notes for the balance, retaining title in the machinery, I will give you enough time to get the stockholders together, and make the assessment, and get enough money to pay this off, if you want to do that way." Well, Mr. Brock said he did not want to do that; that he did not want to make the cash payment and then lose the machinery. I said: "There is no danger of your losing the machinery if you pay for it." * * * * Mr. Brock said all right, that they would make the note; and if the Forshee Lumber Company failed to make the payment, he would take up the note and take up the balance of the notes and take the machinery, and we discussed the matter then, in which we spoke of the delivery of the machinery, and I said: "Now, we have got title in that machinery until it is paid for by the Forshee Lumber Company." And he says: "Yes." "Now," I says, "you can turn it over to me, and I can turn it back to you; but when

you take these notes retaining title in the machinery you have title enough that anybody can't get away from you." And so the matter was closed up that way. The note was made, and they signed it, and I went away. Well, I took the note, and went home, and some time later, after the note was due and not paid, I came back to Delight to get the matter straightened up, and went to Mr. Brock, and told him that it was nearly time this note was due, or that it was going to mature, and if he wanted the machinery to go up there and take charge of it and pay this note off. "Now," I says, "if you want this machinery, all you have to do is to go take charge of it." And he said: "I do not want it; I have been up there with that machinery all the time, and I have lost one of my girls and the the balance of my family are sick all the time." And he said: "I had rather lose the balance of the machinery than to have anything more to do with it." And when he said that I said: "I did not blame him if he could not have health up there," but I said: "I am ready to let you have the machinery if you want it." And there was nothing done then, and never has been anything done, in regard to the matter until the second sale by the receiver. Mr. Brock could have got it, even when the receiver had it in charge, if he had said he wanted it; but he said he did not want it, and I did not want to waste any further time in trying to make a man take something that he did not want. The machinery sold at receiver's sale, and was bought by the Thos. Cox & Sons Machinery Company for \$2,000, and later sold by them for \$1,700.

The trial was before a jury, which returned the following verdict: "We, the jury, find for the defendants without damage."

Judgment was thereupon rendered in favor of the defendants, and the plaintiff has duly prosecuted an appeal to this court.

Sam T. Poe and George A. McConnell, for appellant.

1. Appellees are in no position to claim damages to their credit and business standing because of being sued on a promissory note, a *prima facie* liability. 99 S. W. 580; 41 N. J. Eq. 152; 2 Atl. 286; 1 Cyc. 649; 8 Am. & Eng. Enc. of L. 549; 34 Ark. 707. Even in case of a malicious prosecution, the defendant could not set up damages as a counterclaim. Kirby's Digest, § 6098; 65 Ark. 278; 89 Ark. 368; 32 Ark. 281; 40 Ark. 75; 48 Ark. 396; 83 Ark. 283; 31 Ark. 359. The cross complaint

does not set up a proper counterclaim or set off. Kirby's Dig. § 6099; 87 Ark. 166; 84 Ark. 218; 92 Ark. 594. And the demurrer should have been sustained. On the trial the court erred in allowing appellees to testify as to their business and credit being damaged, and in refusing to instruct the jury that they were not entitled to recover damages.

The damages alleged were too remote and speculative to permit of recovery. 29 Ark. 458; 30 Ark. 55; 8 Am. & Eng. Enc. of L. 548; 55 Ark. 401; *Id.* 376; 57 Ark. 257; 57 Ark. 203; 34 Ark. 184.

2. The disputed question as to whether or not the appellant offered to deliver the machinery to Brock should have been submitted to the jury. The court therefore erred in refusing the fourth instruction requested by appellant, and in giving the first requested by appellees. 76 Ark. 88; 76 Ark. 538; 24 Am. & Eng. Enc. of L. (2 ed.) 1069. After Brock's statement that he did not want the machinery, a formal tender was unnecessary. 35 Cyc. 167, 169, 171.

J. S. Lake, for appellee.

1. Appellant having failed to save exceptions to the testimony introduced in support of the cross complaint, its objections will not be considered here. Kirby's Dig. § 6222; 91 Ark. 43. This court will not reverse for harmless error. The jury disregarded the claims of appellees for damages. 89 Ark. 261; 88 Ark. 7; 91 Ark. 310; 85 Ark. 452; 83 Ark. 1.

2. Instruction 4, requested by appellant, was properly refused. It is ambiguous, assumes the existence of facts and is not warranted by the evidence. 92 Ark. 6; *Id.* 71; 92 Ark. 392. Instruction No. 1, requested by appellee, is right. 76 Ark. 140; 57 Ark. 64; 128 U. S. 590.

3. Appellant was not in possession of the machinery until after Poe's conversation with Brock. There is no sufficient tender if the party making the offer is not in actual possession of the article and ready to make immediate delivery. 2 Parson on Contracts (5 ed.) 648; 39 Ark. 280; 39 Ark. 340.

Delivery of the machinery to Brock was a condition precedent to defendant's liability. 15 Ark. 64; 3 Am. & Eng. Enc. of L. (1 ed.) 911 and notes; 76 Ark. 140; 79 Ark. 140; 57 Ark. 64; 128 U. S. 590.

HART, J.(after stating the facts.) The errors complained of by counsel for appellant, both on account of the introduction of testimony and in the instructions given, as to the measure of damages sustained by appellees by reason of their alleged counterclaim, will not be considered by the court. As insisted by counsel for appellee, no exceptions were saved to the testimony of appellees upon this point. *American Insurance Co. v. Haynie*, 91 Ark. 43.

Besides the errors complained of, both in regard to the introduction of evidence and the instructions of the court upon this point, are eliminated by the verdict of the jury. The jury disregarded the claims of appellees for damages, and found against their contention in that behalf. Hence the errors complained of were harmless, and it is the settled rule of this court that a reversal will not be granted for errors which are not prejudicial to the rights of the complaining party. *Harris v. Remmel*, 83 Ark. 1; *Powell v. Fowler*, 85 Ark. 452; *Capital Fire Ins. Co. v. Kaufman*, 91 Ark. 310; *Western Coal & Mining Co. v. Buchanan*, 88 Ark. 7; *St. Louis, I. M. & S. Ry. C. v. Dysart*, 89 Ark. 261.

We do, however, agree with the contention of counsel for appellant that the court erred in giving the jury instruction No. 1 at the request of appellees and over the objection of appellant. In that instruction the court ignored the contention of appellant that the appellees refused to accept the machinery, and thus absolved the appellant from any further duty to tender or deliver the machinery. The testimony of S. T. Poe in behalf of appellant on this point has been fully set out in the statement of facts, and, without repeating it here, it is sufficient to say that the language and conduct of Brock, as testified to by Poe, in effect was an absolute refusal to accept the machinery, and appellant was justified in relying upon Brock's action as equivalent to a waiver of tender. While the testimony of Poe on this point is squarely denied by Brock, who says that no offer or tender was made until after the machinery was placed in the hands of the receiver, yet the contention of appellant in that regard should have been submitted to the jury.

No tender is necessary when the contract has been definitely repudiated by the buyer, as by a refusal to accept delivery if

tendered. 35 Cyc. 171 and cases cited in note 43; *Kirchman v. Tuffli Brothers Pig Iron & Coke Co.*, 92 Ark. 111.

Counsel for appellant also assigns as error the refusal of the court to give an instruction asked by them on this point. We do not think the court erred in refusing the instruction in the form in which it was asked; for it was open to the objection that it assumed that the appellees had refused to accept the machinery.

For the error in giving instruction No. 1 at the request of appellees the judgment is reversed, and the cause remanded for a new trial.

DICKERSON v. HAMBY.

Opinion delivered October 24, 1910.

1. **PLEADING—SUFFICIENCY.**—In determining the sufficiency of any pleading, whether of cause of action or of defense, every fair and reasonable intendment must be indulged in to support such pleading. (Page 166.)
2. **SAME—REMEDY FOR DEFECTIVE AVERMENTS.**—Where the averments of an answer are incomplete, ambiguous or defective, the remedy is a motion to make them more definite and certain. (Page 166.)
3. **SAME—ANSWER—DEMURRER.**—An answer is not demurrable if the facts stated, with every reasonable inference to be drawn therefrom, constitute a good defense. (Page 166.)
4. **SAME—PLEA OF NO CONSIDERATION—SUFFICIENCY.**—A plea of no consideration, without stating the circumstances attending the execution of the contract sued on, is a sufficient defense; but such plea is demurrable where the answer also sets out the facts attending the execution of the written contract sued on, and these facts, by reasonable intendment, do not constitute a valid defense. (Page 166.)
5. **BILLS AND NOTES—FAILURE OF CONSIDERATION.**—An answer, in a suit against the makers of two notes, which by reasonable intendment alleges that the notes were executed upon condition that if the makers should be indicted for murder the payees would defend them in the circuit court and, if necessary, in the Supreme Court, and that this was the sole consideration, and that the makers had not been indicted, states a good defense. (Page 167.)
6. **PLEADING—AMENDMENT.**—As a general rule, it is a matter of course to permit parties to amend their pleadings upon a demurrer thereto being sustained and before trial. (Page 167.)

Appeal from Clark Circuit Court; *Jacob M. Carter*, Judge; reversed.

McMillan & McMillan, for appellants.

1. The court erred in sustaining the demurrer to the substituted answer. A plea of no consideration is good without stating the circumstances attending the execution of the contract sued on. 34 Ark. 172; 6 Ark. 412; 10 Ark. 273; 11 Ark. 308; 15 Ind. 15; 60 Barb. 346; Newman's Pl. & Pr., 543; 31 Ark. 657; 60 Ark. 612. In the making of a contract between an attorney and client, the law recognizes that the attorney has an advantage over the client, and places on him the burden to show the fairness of the transaction, and the adequacy of the consideration. 73 Ark. 580; 31 Am. Rep. 24, 25.

2. It was error to refuse leave to appellants to amend their substituted answer so as to read like the original answer, and it was error to strike the original answer from the files. Kirby's Digest, § § 5991, 1282 and 6098; 87 Ark. 211; 94 Ark. 27; 94 Ark. 365; Kirby's Digest, § 6145; 42 Ark. 59; 64 Ark. 257; 29 Ark. 323; 53 Ark. 263; 58 Ark. 504; 59 Ark. 317.

W. V. Tompkins and Hamby & Haynie, for appellees.

FRAUENTHAL, J. This was an action at law instituted by the appellees for the recovery of two notes. One of the notes was for the sum of \$400, and the other was for \$500; and the appellees alleged that appellants had paid \$200 on the former note. The appellants filed an answer, in which they alleged that they were arrested upon the charge of having committed the crime of murder in the first degree, and that they employed the appellees, who were attorneys at law, to represent them in the defense of said charge; that after appellees had accepted the employment they told the appellants that they would be indicted for the crime of murder in the first degree, and tried in the circuit court upon such indictment, and, relying upon said statement and in consideration that appellants would defend them against said charge in all courts to which the same might be carried, they executed the said notes; that appellants were not indicted, but the said charge against them was dismissed by the grand jury; and that they had received no consideration for said notes. They further alleged that one of the appellees

came to them at the jail, at their request, while the charge against them was pending in the examining court, and agreed to represent them in that court for \$110, and that appellants paid to appellees that sum for that service; that appellees told them they would be indicted upon said charge, and the appellants desired to know of them what they would ask to represent them in all the courts upon said charge; that appellees then stated they would make it satisfactory with them; that after they had, through their attorneys, the appellees, announced ready for trial in the examining court, the appellees called them into an adjoining room, and for the first time presented the notes herein sued on and asked them to sign same; that they refused at first to sign them, and told appellees they were taking advantage of them, but because they had no opportunity to then secure other attorneys and because of the undue influence exerted by the appellees upon them, they signed the notes; that some three months thereafter they paid to appellees \$200 upon the representation made by appellees that they would be indicted, and should prepare for the trial upon the indictment that would be returned.

To this answer the appellees filed a reply, and thereupon the cause proceeded to a trial before a jury, which resulted in a mistrial. The appellees then filed a motion to transfer the cause to the chancery court upon the ground that the answer alleged matters in defense that were only cognizable in a court of equity. Thereupon appellants withdrew the above answer, and filed a substituted answer. In this substituted answer the appellants pleaded that the notes were executed without any consideration therefor. They alleged that they were under arrest upon a charge of murder in the first degree, and that they executed said notes upon the sole consideration that appellees would defend them in the circuit court against said charge in event an indictment should be returned against them and also in the Supreme Court in event they should be convicted in said circuit court upon said charge; and they alleged that no indictment was returned against them, and that therefore appellees did not, and had no occasion to, so defend them.

To this answer the appellees filed a demurrer, which was by the court sustained. The appellants then asked permission

to amend said substituted answer by inserting therein averments that the notes were obtained by fraud; and the court refused to permit them to so amend their answer upon the ground that the allegations of fraud had been made in appellant's original answer, and that they had withdrawn said answer upon the announcement of the court that it would sustain the appellee's motion to transfer the case to the chancery court because said answer set up an equitable defense. The appellants then filed the original answer by way of amendment of the substituted answer, and asked that the cause be transferred to the chancery court. This answer was stricken from the files by the court; and upon permission being asked by appellants the court refused to allow them to file any further pleading. Thereupon the court rendered judgment for the amount due on said notes.

In determining whether a pleading, complaint or answer makes sufficient allegations to constitute a cause of action or to state a defense, every fair and reasonable intendment must be indulged in to support such pleading. If the averments are incomplete, ambiguous or defective, the proper mode to obtain correction is by motion to make the allegations more definite and certain. If the facts stated in the answer, with every reasonable inference that may be drawn therefrom, constitute a good defense, the demurrer thereto should be overruled. *Cazort & McGehee Co. v. Dunbar*, 91 Ark. 400; *Cox v. Smith*, 93 Ark. 371.

In the substituted answer filed by the appellants the defense of no consideration was in effect set up. It has been held by this court that a plea of no consideration, without stating the circumstances attending the execution of the contract sued on, is a defense sufficiently set up. *Dickson v. Burks*, 6 Ark. 412; *Cheney v. Higginbotham*, 10 Ark. 273; *Dickson v. Burks*, 11 Ark. 308; *Catlin v. Horne*, 34 Ark. 169; *Taylor v. Purcell*, 60 Ark. 612; 4 Ency. Plead. & Practice, 945.

But such plea may be demurrable where the answer also sets out the facts attending the execution of the written contract sued on, and those facts do not, with every fair and reasonable inference that may be drawn from them, constitute a valid defense. *Henderson v. Farrally*, 16 Ill. 137.

From the allegations made in said substituted answer it may be reasonably inferred that the notes were executed for the consideration that, in event the appellants should be indicted by the grand jury for the crime of murder in the first degree, the appellees would defend them against the charge made by such indictment in the circuit court, and also represent them in the Supreme Court if they should be convicted upon such trial; that this was the sole consideration of said notes; that the above event had not occurred, and the conditions upon which the notes had been executed had not been complied with, and that therefore there was no consideration therefor. We are of opinion that the substituted answer did set up a valid defense to the cause of action.

Inasmuch as this cause must be remanded for a new trial, we think it appropriate to say that it would be proper for the lower court to permit the appellants to amend their answer by also making the allegations set out in their original answer. The allegations of fraud perpetrated and undue influence exercised upon appellants in obtaining the execution of the notes did not change the defense, but were only a species of the plea of no consideration that was made. A refusal of leave to amend a pleading is subject to review by this court, but ordinarily the decision of the lower court refusing such leave will be sustained unless there appears an abuse of discretion under all the circumstances. It is a general rule that it is almost a matter of course to permit parties to amend their pleadings upon a demurrer thereto being sustained and before trial. Section 6095 of Kirby's Digest provides that if the court sustains the demurrer the party may amend his pleading. In the case of *Burke v. Snell*, 42 Ark. 57, it is said: "The primary object of the Code is the trial of causes upon their merits, and to that end the provisions for amendment are exceedingly broad and liberal." Upon the remand of this cause we think that under the circumstances of this case the appellants should be permitted, if they so desire, to amend their substituted answer by adding thereto the allegations made in their original answer. *Caldwell v. Meshew*, 53 Ark. 263; *Murray v. Boyd*, 58 Ark. 404; *Southern Ins. Co. v. Hastings*, 64 Ark. 253; 1 Enc. Plead. & Prac. 590.

The judgment is reversed, and the cause remanded for a new trial.

PAYNE v. McBRIDE.

Opinion delivered October 24, 1910.

BOUNDARIES—PAROL AGREEMENT—STATUTE OF LIMITATIONS.—Where there is a doubt, dispute or uncertainty as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them although the possession is not for the full statutory period.

Appeal from Yell Circuit Court, Danville District; *Hugh Basham*, Judge; affirmed.

John M. Parker and Priddy & Chambers, for appellant.

1. Where there is a shortage or deficiency between two established government corners, it should be apportioned to each subdivision lying between such established corners, and not placed wholly on the lot or subdivision lying on the west line of the section. Rev. Stat. U. S. § 2396; Tiedeman on Real Prop. (3 ed.), § 596; 19 Wis. 452; 2 Ia. 153; 67 Ill. 306; 31 Ia. 488; 44 Kan. 354; 137 Ind. 319; 48 Wis. 75; 92 N. W. 1013.

2. The statute of limitations does not apply in this case. It is conclusively shown that appellee held the strip under the belief that it was a part of his tract, and not with any intention of holding any part of appellant's land. 72 Ark. 498. Having pleaded the statute, the burden of proof was on the appellee. 86 Ark. 309.

Bullock & Davis, for appellee.

1. It is the surveyor's duty to make his survey conform to the original (government) survey. Kirby's Digest, § 1146. By the government rule, in surveying public lands as many full forties are laid off within the section as it is susceptible of, and if there is any shortage it must be placed upon the exterior west or north tiers of forties. Public Domain, 193, 602, 671; 30 Ind. 306; 30 Ala. 245; 57 Mo. 317.

2. The line established by Hunt's survey on January 7, 1901, and agreed upon by appellant's father and appellee, settles

this controversy. Adjoining owners may by parol fix a line which will be binding upon them, even though their possession under such agreement may not continue for the full statutory period. 8 Am. & Eng. Ann. Cas. 83, and authorities cited; 136 U. S. 1074; 4 Wheat. (U. S.) 513; 62 Ark. 629; 71 Ark. 248; 15 Ark. 342; 75 Ark. 400, 405; 72 Ill. 113; 14 N. Y. St. 312; 68 Kan. 607; 35 Tex. 801; 91 Mo. 457; 138 Cal. 394; 11 Johns. (N. Y.) 123.

HART, J. This is a suit in ejectment brought by J. O. Payne against A. H. McBride. The complaint alleges that Payne is the owner in fee and entitled to the possession of the northwest quarter of southwest quarter and southwest quarter of northwest quarter of section 6, in township 5 north, range 23 west, situated in Yell County, Arkansas, and that A. H. McBride is in the unlawful possession of a strip of said lands on the east side thereof extending the full length thereof.

McBride answered, setting up that he was owner in fee and in the possession of the southeast quarter of northwest quarter and the northeast quarter of southwest quarter of the section of land described in the complaint, and the strip of land in dispute is within the limits of his said lands. Each party deraigned title to the land claimed by him, and the only issue in the case is whether the strip sued for is a part of plaintiff's or defendant's 80-acre tract.

The court directed the jury trying the case to return a verdict for the defendant, and the plaintiff, by this appeal, seeks to reverse the judgment rendered.

The section of land in question lies on the township and range line, and is a fractional section. As shown by the plat of the survey made by the United States Government, Payne's land, the northwest quarter of southwest quarter, had 42.90 acres, and the southwest quarter of the northwest quarter had 41.30 acres; and McBride's land had 80 acres. A resurvey of the quarter section, which contains the lands of both parties, shows a deficiency, instead of an excess. It is the contention of the plaintiff that this loss should be proportioned on the whole quarter section. The defendant contends that the loss should fall upon the exterior quarter-quarters of the section. The views which we shall hereinafter express will render it unnecessary for us to decide this question.

It appears from the testimony of Charles Hunt, a surveyor of twenty-seven years' experience, that he was called upon to survey the whole quarter section in January, 1901. At that time John Payne, who was the father of the plaintiff, and who is now dead, owned the land of the plaintiff. There was a dispute between him and the defendant, A. H. McBride, as to the true location of the through boundary line between. It was agreed to call in Charles Hunt to fix the true boundary line, and on the 7th day of January, 1891, he surveyed the land and established the boundary line between John Payne and A. H. McBride. It was agreed that this survey should mark the dividing line between them.

The plaintiff admits that the fence was put on the line established by Hunt, and that McBride has since been in possession of the land now in controversy, cultivating up to the fence and claiming it as his own, but says he does not know anything about his father having made an agreement with McBride that this should be the permanent boundary line between them.

This testimony is undisputed, and from it the court was right in directing the jury to return a verdict for the defendant.

In the case of *Kitchen v. Chantland*, 130 Ia. 618, 8 Am. & Eng. Ann. Cas. 81, the court held: "Where there is doubt or uncertainty or a dispute as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession is not for the full statutory period."

This case is in accord with the weight of authority, and the principle announced has been recognized and adopted by this court in the following cases: *Sherman v. King*, 71 Ark. 248; *Cox v. Daugherty*, 75 Ark. 395; *Deidrich v. Simmons*, 75 Ark. 400.

Agreements of this character do not operate as a conveyance of the land, but proceed upon the theory that the true boundary line is in dispute, and the agreement serves to establish the line to which the title of each party extends. The parties hold up to the line so fixed by virtue of their deeds, and not by virtue of a parol transfer.

The judgment will be affirmed.

WALDROOP v. RUDELL.

Opinion delivered October 24, 1910.

1. LOST INSTRUMENT—PAROL EVIDENCE.—Where a will is admitted to have been lost, parol evidence of its existence and effect is admissible. (Page 172.)
2. APPEAL AND ERROR—CHANCERY CASES.—Though appeals from chancery courts are tried *de novo*, a chancellor's findings of fact will be sustained unless clearly against the preponderance of the evidence. (Page 174.)
3. EVIDENCE—HEARSAY.—In an action involving the title to land testimony of witnesses that they understood that a certain person owned the land in controversy was inadmissible, being hearsay. (Page 175.)
4. SAME—DECLARATIONS AS TO TITLE.—While declarations of a person going to show the character and extent of his possession are competent, his declarations as to his title are not competent for the reason that they are self-serving declarations. (Page 175.)

Appeal from Sebastian Chancery Court; *J. Virgil Bourland*, Chancellor; affirmed.

Rowe & Rowe, for appellant.

Holland & Holland, for appellee.

This court will not disturb the findings of a chancery court unless it is clearly contrary to the preponderance of the evidence. 68 Ark. 314; 71 Ark. 605; 72 Ark. 67; 73 Ark. 487; 75 Ark. 52; 77 Ark. 305.

HART, J. This suit was instituted in the Sebastian Chancery Court for the Greenwood District by Rebecca Waldroop against Edward Ruddell, Tom Chamberlain, Joe Jones, Sr., and Joe Jones, Jr., and the relief sought was to enjoin defendant, Edward Ruddell, and the other defendants as his lessees from operating a coal mine and destroying the timber on the following described lands: The southeast quarter of the southeast quarter of section 20, and northwest quarter of northeast quarter of section 29, all in township 6 north, range 31 west, in Sebastian County, Arkansas. Both the plaintiff, Rebecca Waldroop, and the defendant, Edward Ruddell, claim title to the lands, and both parties claim from a common source.

Edward Ruddell was the husband of Mary Ruddell, and Rebecca Waldroop was her daughter by a former husband. Mary Ruddell was the daughter of Burrell P. Evans, who, it is admitted, originally was the owner of the lands. She was married to Edward Ruddell in January, 1853, and subsequently

during the same year they moved on the lands in controversy.

Burrell P. Evans died testate in 1864, and Mary Ruddell died intestate in 1891. It is the contention of the plaintiff, Rebecca Waldroop, that Burrell P. Evans devised the lands in controversy to her mother, Mary Ruddell, and that she inherited from her mother. On the other hand, it is the contention of the defendant, Edward Ruddell, that under the terms of the will of Burrell P. Evans he and his wife, Mary Ruddell, were each seized of an entirety in the lands in controversy, and that, upon the death of Mary Ruddell, he took the whole estate; and could therefore sell or lease the same.

The determination of this question is the real issue in the case.

Edward Ruddell testified that after the death of Burrell P. Evans he deposited his will with the clerk at the courthouse. That subsequently the courthouse burned down, and that thereafter the will could not be found. Rebecca Waldroop, the plaintiff, also testified that the will of Burrell P. Evans had been lost or destroyed. This was sufficient to admit secondary proof by parol of its existence and effect. *Calloway v. Cossart*, 45 Ark. 81. Rebecca Waldroop further testified that she had read the will of said Burrell P. Evans; that he devised 80 acres of land to each of his six children, and that the land in controversy was devised to her mother, Mary Ruddell; that during her lifetime Mary Ruddell conveyed to her by deed one of the forty-acre tracts in controversy, and that Mary Ruddell owned the remaining forty at the time of death, which occurred some time during the year 1891.

Other witnesses for plaintiff testified that it was their understanding that Burrell P. Evans had devised the lands in controversy to Mary Ruddell, but they admitted that they had never seen the will. Some of them said that Mary Ruddell was buried on the land, and had expressed a wish to be buried there because she owned the land; that she had reference to the forty-acre tract, which she did not convey to the plaintiff. Another witness, a daughter of Edward and Mary Ruddell, testified that her father told her one time that the children would not allow him to sell the land, and that he was not going to pay the taxes on it. Another witness testified that he had a con-

versation with Edward Ruddell about four years before, in which he advised him to sell the land and live on the proceeds; and that Ruddell replied that he was about to sell it, and some of the children would not sign the deed; that Edward Ruddell said that he did not know whether it was willed to Mary Ruddell or Mary Ruddell and Edward Ruddell.

Edward Ruddell testified that he read the will of Burrell P. Evans before it was destroyed, and that it began like this: "I bequeath to my daughter, Mary, and her husband, Edward Ruddell, southeast of the southeast section 20, township range 31; northwest of the northeast section 29, range 31, township 6;" that there was found with the will and land papers, deeds and patents of Burrell P. Evans, after his death a memorandum of the will. It is as follows:

"Ed. I. Ruddell southeast quarter of the southeast quarter, section 20, township 6, range 31, northwest quarter, northeast quarter, section 29, township 6, range 31.

"2. Caroline S. Tedford, north half, northeast quarter, section 7, township 6, range 31 (Matilda Robbins and John G. Robbins, northwest quarter, southeast quarter, section 29, township 6, range 31, and northeast quarter, southeast quarter, section 17, township 6, range 31).

"3. Heirs of John Evans, south half, northeast quarter, section 8; northeast quarter, southeast quarter, township 6, range 31.

"4. William P. Evans, northwest quarter, southwest quarter, section 8; northeast quarter, southeast quarter, township 6, range 31; southeast quarter, section 7.

"Dinah Evans, north fractional quarter, northwest fractional quarter, section 8, township 5, range 31.

"6. Sarah Evans and her assigns for and during the term of her natural life all remaining lands, houses, tenements, horses, cattle, feed, etc."

Edward Ruddell further testified that he and Mary Ruddell moved on the land in controversy soon after their marriage in 1853, and that he has been in possession of the land (except one forty which he and his wife deeded to the plaintiff) ever since. That he included in the deed to plaintiff another forty-acre tract, which belonged to him individually. That the reason

for doing this was that they were giving each of their children eighty acres, and that he did not want to make any discrimination in regard to the plaintiff because she was his stepdaughter. That several years after Mary Ruddell had died, and after he had married again, the plaintiff came to him, and stated that the former deed had been burned, and requested that he execute another deed to the land. This he did. The second deed was executed by him and his second wife. The plaintiff admits this to be true except in regard to the first deed, which, as above stated, she says was signed only by Mary Ruddell.

In response to the question, "All the time you was in possession up to the time your wife died, you were living together, and she was in as much possession as you was?" he answered, "Yes, sir; whatever was mine was hers."

Other witnesses in his behalf testified that the plaintiff had said to them that if it had not been for Edward Ruddell she would not have had a foot of land; and that Mary Ruddell had expressed a wish to be buried near a certain rock on the land in controversy because she had often rested there with her children while carrying milk to a neighbor's.

The forty-acre tract which the defendant, Edward Ruddell, conveyed to the plaintiff passed out of the case, and, as to the remaining forty, the chancellor found that the defendant, Edward Ruddell, and Mary Ruddell, his wife, under the will of Burrell P. Evans, became seized of an entirety, and that upon the death of the wife, the whole estate went to the husband as survivor.

Accordingly a decree was entered in favor of the defendant, Edward Ruddell, and the plaintiff has duly prosecuted an appeal to this court. While appeals from chancery courts are tried *de novo* on the record made in the court below, it has always been the settled rule of the court that the findings of fact made by the chancellor will be sustained unless clearly against the preponderance of the evidence. This rule has been announced so often as to render a citation of authority in support of it unnecessary.

The testimony of witnesses in behalf of appellant that they understood that Mary Ruddell owned the land in controversy was incompetent as being hearsay. Their testimony as to what

Mary Ruddell said about her title to the land was also incompetent. While it has been held that declarations of a decedent going to show the character and extent of his possession are competent, declarations as to title are not competent for the reason that they are self-serving declarations. *Seawell v. Young*, 77 Ark. 309; *Jeffery v. Jeffery*, 87 Ark. 496.

It is conceded by both parties that Burrell P. Evans made a will devising the land in controversy, and that the will was lost or destroyed. The plaintiff and the defendant, Edward Ruddell, so far as the record discloses, are the only persons who know anything about the contents of the lost will. The memorandum which was found with the will to some extent strengthens the testimony of Edward Ruddell. It shows that he was in the mind of the testator when he began to prepare his will. In any event the chancellor found the facts in favor of the defendant, Edward Ruddell, and it can not be said that his findings are clearly against the weight of the evidence.

The decree will therefore be affirmed.

GREEN v. STATE.

Opinion delivered October 24, 1910.

1. HUSBAND AND WIFE—ABANDONMENT—VALIDITY OF STATUTE PUNISHING.—Acts 1909, p. 134, punishing by fine or imprisonment, or by both, a husband who, without good cause, abandons or deserts his wife or children under 12 years is a valid statute. (Page 177.)
2. BILL OF EXCEPTIONS—FILING.—A bill of exceptions which was not filed within the time required or authorized by law is a nullity. (Page 177.)

Appeal from Little River Circuit Court; *James S. Steel*, Judge; affirmed.

Glass, Estes, King & Burford, for appellant.

1. The purpose of the act is to punish for a failure to support or provide for the family, and not to punish a failure to consort with them. Two elements must exist before the offense is complete, failure to provide or make provision for, and desertion and abandonment. "And" means "in addition to." 156 Ill. 241; 80 Ala. 95.

2. The jury totally ignored the law as given by the court; the verdict was the result of passion and prejudice, and it was error to allow leading questions and incompetent and irrelevant testimony to go before the jury.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

1. There was no bill of exceptions, not having been signed by the judge in term time, and no time having been given. 38 Ark. 216; 33 *Id.* 558; 72 *Id.* 264; 31 *Id.* 725; 34 *Id.* 452.

2. Proper exceptions were not saved to the introduction of incompetent testimony in the motion for new trial. 34 Ark. 737; 70 *Id.* 430; 75 *Id.* 111.

BATTLE, J. Abner Green was indicted for, and convicted of, abandoning his wife without good cause and failing to maintain and support her, and his punishment was assessed at six months' imprisonment in jail and at a fine of five hundred dollars; and judgment was rendered accordingly, and he appealed therefrom to this court.

The statute upon which the indictment is based is as follows: "If any man shall, without good cause, abandon or desert his wife, or abandon his child or children under the age of twelve years, born in or legitimized by lawful wedlock, and shall fail, neglect or refuse to maintain or provide for such wife, child or children, he shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by a fine not less than fifty nor more than one thousand dollars, or by both such fine and imprisonment." Acts of 1909, page 134.

The constitutionality of statutes similar to the above statute has been sustained by the Supreme Court of Louisiana, and treated as valid by other courts. In *State v. Cucullen*, 110 La. 1087, 1094, the court, upholding such a statute, said: "The performance by a husband and father of the legal duties which he voluntarily assumed in contracting marriage is a matter which not only affects the particular parties in interest, but the public at large, as affecting the general public welfare. The State is deeply interested in upholding and seeing enforced the rights and obligations springing from the family relations, for upon

their being upheld and enforced rest the well-being of society itself." See 21 Cyclopedia of Law and Procedure, 1611, and cases cited.

We hold the statute copied above to be a valid statute.

The validity of the indictment is not questioned.

The questions raised by the appellant in this court relate to evidence excluded by the court over the objections of the defendant, and to evidence admitted over the objections of the defendant, and to the sufficiency of the evidence to sustain the verdict. A bill of exceptions is necessary to enable and authorize this court to consider and decide these questions. There is what purports to be a bill of exceptions filed in this case. But it does not appear to have been filed at the time required or authorized by law, and is therefore a nullity. *Carroll v. Sanders*, 38 Ark. 216; *Morris v. Thomasson*, 72 Ark. 264. No other bill of exceptions was filed.

Judgment affirmed.

CULBREATH v. STATE.

Opinion delivered October 24, 1910.

1. CRIMINAL LAW—ARGUMENT.—The defendant in a murder case did not testify, and the State's attorney in his closing argument said: "Where was the defendant that day. He has never seen fit to say. He has not shown by any one where he was between the hours of 10 o'clock in the morning and 1:30 in the afternoon." *Held* not objectionable as a criticism of defendant's failure to testify in his own behalf. (Page 180.)
2. SAME—REFUSAL TO PERMIT JURY TO TAKE INSTRUCTIONS.—It was not error in a criminal case to refuse to permit the jury to take the instructions of the court to the jury room. (Page 181.)

Appeal from Bradley Circuit Court; *Henry W. Wells*, Judge; affirmed.

B. L. Herring, for appellant.

1. Proof of threats and ill will is not alone sufficient to authorize conviction in cases of homicide. 21 Cyc. 1008. Strong probability or suspicion is not sufficient, but the proof must

be such as to satisfy the mind of a reasonable person to a moral certainty or beyond a reasonable doubt. 21 Cyc. 1006.

2. The evidence is not sufficient to justify a conviction because it fails to identify and connect the defendant with the homicide. 70 Ark. 556; 88 Va. 20; 13 S. E. 298; 12 S. W. 502; 116 S. W. 344; 122 S. W. 259; 23 So. 579; 27 So. 621.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

1. The evidence, though circumstantial, is sufficient to support the verdict. 94 Ark. 538.

2. Where instructions given are sections of the statutes of the State, it is not necessary for the court to reduce them to writing. 29 Ark. 238. Whether the jury will be permitted to take the instructions with them to their room or not is a matter within the sound discretion of the trial court. 30 Ark. 329; 29 Ark. 17.

3. The remarks of the State's attorney were legitimate argument, not comment upon the failure of the defendant to take the witness stand, but rather in the nature of comment upon his failure to introduce proof in support of an alibi. 61 Vt. 153; 85 Va. 128; 151 U. S. 118; 135 Ind. 38; 2 Enc. Pl. & Pr. 722; 31 Tex. Crim. Rep. 342.

McCULLOCH, C. J. The grand jury of Bradley County returned an indictment against defendant, John Culbreath, for murder in the first degree, which was alleged to have been committed in that county on May 26, 1910, by the killing of Albert Bailey. On the trial of the case defendant was convicted of murder in the first degree, and he appealed to this court. The principal contention is that the conviction rests entirely upon circumstantial evidence insufficient to sustain the verdict.

Bailey was shot and killed while he was driving along a road in his wagon, returning from Warren, the county seat of Bradley County. He lived about seven miles from Warren, and drove to town between nine and ten o'clock in the forenoon, and was returning home when he was killed. There was no eye-witness to the killing, but about 1:30 o'clock in the afternoon some persons who lived on the road discovered the team of mules, without a driver, and on examination found the bloody

remains in the wagon, the body being riddled with buckshot. This was about a mile distant from the scene of the killing, in the direction of Bailey's home. It is evident that the mules had taken fright at the shot, and, after plunging forward, as some of the witnesses stated, pursued their course along the road toward the home of the deceased. Blood was found in the road near the place, and near the roadside there were indications that the assassin had lain in wait behind a log for his victim, and pressed down the weeds and grass.

The defendant lived on the road, about a mile from Warren, and he was observed by some of his neighbors, shortly after Bailey drove by going into town, to leave his house with a gun in his hand; and the same persons observed his return home with the gun a short time after the shot was fired which killed Bailey. A witness not far from the scene of the killing heard a shot a few minutes after 1 o'clock, and a very short time afterwards another witness met defendant in the road about three-quarters of a mile or a mile from the scene, coming from that direction with a double-barreled, breach-loading shotgun in his hands, and just before he met this witness he turned out of the road into the woods. Another witness, a woman of defendant's acquaintance, testified that he came by their house in the morning, and returned by the same route later, and complained of being sick, saying that he had had a chill, and had been wallowing on the ground. She said that the condition of his clothing indicated that he had been wallowing on the ground. It was proved by numerous witnesses that the defendant and Bailey had previously had trouble, that ill will existed between them, and that defendant had repeatedly threatened to kill Bailey. The threats began, according to the proof, some time in January before the killing in May, and continued from time to time down to within a few days of the killing. Defendant went to the extent, according to the testimony of one witness, of saying that "some time Albert Bailey would be coming through the woods and would be found dead in a wagon, and they would not know whether he did it or who did it." A few days before the killing he purchased a box of buckshot shells for a breech-loading shotgun.

We are of the opinion that the record presents a case of

circumstantial evidence sufficiently strong to justify the conviction. The *corpus delicti* is established by positive and direct evidence. There was present, not only a motive for committing the deed, but frequent expressions of a fixed purpose to commit it, even in the identical manner in which it was finally done. Albert Bailey was, as had been foreshadowed by defendant himself, "found dead in a wagon," "coming through the woods," or at any rate along a lonely country road. Defendant had the opportunity to perpetrate the crime and the means, and was observed in close proximity to the scene immediately after the tragedy occurred. He was the only person that was seen, and the only one, so far as appears from this record, toward whom the finger of guilt points. Another strong circumstance indicating his guilt is in the false account he gave of his whereabouts during the day. He told a witness that he was at home sick all day, and there is positive proof to the contrary. He made no attempt at the trial to give an account of his doings that day. Giving due weight to each of the circumstances set forth in the evidence, we are not willing to say that the jury were unwarranted in concluding that the defendant committed the crime charged in the indictment. The evidence was legally sufficient to sustain the verdict.

Many decisions are pressed upon us in support of the contention that the evidence does not sustain the verdict. Each case, of course, must stand upon its own particular circumstances, and it is difficult to find a precedent for declaring that a given chain of circumstances is or is not sufficient to sustain a conviction. We have weighed the circumstances in this case by comparison, as far as possible, with other adjudged cases, and we are unable to reach a conclusion other than that already expressed—that the evidence is sufficient to sustain the verdict.

Another ground urged for reversal is as to alleged improper remarks of an attorney representing the State in his closing argument. The following are the objectionable remarks: "Where was the defendant that day? He has never seen fit to say. He has not shown by any one where he was between the hours of 10 o'clock in the morning and 1:30 in the afternoon." Taking the whole statement together, we do not

think it can fairly be construed as a comment or criticism on defendant's failure to testify in his own behalf or as calling attention to that fact. It was merely an expression of the opinion of counsel that the defendant had not adduced evidence accounting for his whereabouts during the hours named. We conclude that there was no prejudicial error in the remarks. *Blackshire v. State*, 94 Ark: 548; *Davis v. State*, ante p. 7. The following authorities on the subject may be examined with profit: *Frazer v. State*, 135 Ind. 38; *Watt v. People*, 127 Ill. 9; *State v. Johnson*, 88 N. C. 623; *State v. Weddington*, 103 N. C. 364; *Jackson v. State*, 31 Tex. Cr. App. 342; *Nite v. State*, 41 Tex. Cr. App. 340; *State v. Preston*, 77 Mo. 294; *State v. Ruck*, 194 Mo. 416; *State v. Griswold*, 73 Conn. 95; *State v. Davis*, 110 Ia. 746; *Com. v. McConnell*, 162 Mass. 499; *Jackson v. U. S.*, 102 Fed. 473; *Cope v. Com.* (Ky.), 47 S. W. 436.

It is also urged that the case should be reversed for the reason that the trial judge refused to permit the jury to take the instructions of the court to the jury room. That was a matter within the sound discretion of the court, and no reversible error is found in it.

We have carefully examined the whole record, as we are required by statute to do, to search for errors whether embraced in the motion for new trial or not, and we are unable to discover anything which could be construed as prejudicial error; so the judgment is affirmed.

TURRENTINE v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered July 11, 1910.

COSTS OF FORMER ACTION—PAYMENT AS CONDITION OF MAINTAINING ACTION.—Under the statute unconditionally permitting the bringing of a new action after the voluntary dismissal of a former action (*Kirby's Digest*, § 5083), it was error to dismiss an action because the plaintiff did not pay the costs of a former action based on the same cause which he had voluntarily dismissed.

Appeal from Monroe Circuit Court; *Eugene Lankford*, Judge; reversed.

H. A. Parker, for appellant.

Statutes relating to costs are to be construed strictly. 47 Ark. 442; 61 Ark. 407; 73 Ark. 600. The right to recover costs did not exist at common law. 60 Ark. 194. Defendant's motion should have been stricken from the files. 7 Ark. 121; 12 Ark. 635. The statute requiring nonresidents to file bond for costs is not mandatory. 11 Ark. 9. This petition can not be controverted by answer. 19 Ark. 121.

S. H. West and *J. C. Hawthorne*, for appellee.

There was no motion for a new trial, and no bill of exceptions taken; consequently there is nothing before this court. 36 Ark. 456. A resident plaintiff must pay or secure the costs. Kirby's Digest, § 3491. The presumption is that all actions after the first were vexatiously brought. 64 Ind. 18; 8 N. E. 563; 5 N. E. 548. A subsequent suit can not be maintained until the costs in the former have been paid. 9 N. J. L. 86; 4 Mod. 379; 2 D. & E. 511; 1 John. 247; 19 John. 237.

MCCULLOCH, C. J. The plaintiff, Ed Turrentine, instituted this action in the circuit court of Monroe County against the defendant railway company to recover damages for personal injuries alleged to have been sustained by reason of the negligent acts of defendant's servants in the operation of its trains. He had previously instituted four successive actions in other circuit courts of the State, based on the same alleged cause of action (two of the actions being removed to the Federal courts), and dismissed each one in turn before final submission. He was a minor when some of the actions were instituted, but was of full age when the present one was instituted.

The defendant claims to have expended the sum of \$783.35 in costs before said former actions were dismissed, and filed a motion in the present action to require plaintiff to pay the costs of the former actions as a condition on which he would be permitted to prosecute this action. The court sustained the motion. Plaintiff excepted, and then asked to be permitted to prosecute the action *in forma pauperis*, which request was denied by the court. The plaintiff declined to pay the costs of the former actions or to secure the costs of the present one, and the court ordered a dismissal of the case. Plaintiff appealed.

The only statutes of this State requiring litigants to give bond for cost are directed against nonresidents of the State and corporations other than banking corporations, and against guardians and next friends suing for infants and persons of unsound mind, and assignees other than indorsees of bills of exchange and promissory notes. Kirby's Digest, § § 959, 962. There is no statutory authority for requiring resident litigants to give bond except those especially enumerated above. Officers are not required to perform services for litigants without payment of fees in advance, except in cases which the court allows persons to prosecute *in forma pauperis*.

The ruling of the court requiring plaintiff either to secure the costs of this action or pay the costs of the former actions was unauthorized. Courts may, in their discretion, impose such terms upon the setting aside of an order of dismissal for want of prosecution; but the statute unconditionally permits the bringing of a new action after the voluntary dismissal of a former action, and the court can not impose a condition on the exercise of that right.

There are decisions of other courts holding to the contrary, but we are not without authority in support of the conclusion we reach, which we think is in harmony with the statutes of this State authorizing the dismissal of actions without prejudice to the bringing of another action for the same cause. *Hobbs v. Louisville, H. & St. Louis Ry. Co.*, 31 Ky. Law Rep. 452, 102 S. W. 818; *Wilson v. Sullivan* (Ky.), 112 S. W. 1121; *Davenport, Rock Island & N. W. Ry. Co. v. DeYeager*, 112 Ill. App. 537. Decisions *per contra* are collected in 11 Cyc. 255, *et seq.*

We do not mean to say that it is beyond the power of a trial court to dismiss an action found to have been instituted not in good faith, but vexatiously, for the purpose of harrassing and annoying the adversary party. This would be an abuse of process, which the court could correct by dismissal of the action. But such is not the present case. There is nothing to show that the plaintiff did not bring his action in good faith, and the court did not so find. The order of dismissal was rendered because plaintiff did not and could not pay the costs of the former action.

Reversed and remanded with directions to overrule the motion to dismiss, and for further proceedings in the case.

EL DORADO ICE & PLANING MILL COMPANY v. KINARD.

Opinion delivered October 17, 1910.

1. **CONTRACTS—MUTUALITY.**—A contract which leaves it entirely optional with one of the parties as to whether or not he will perform his promise is not binding upon the other. (Page 187.)
2. **SAME—MUTUALITY.**—A contract for the sale of the entire output of a mill of a known capacity for a definite period of time and at certain prices is binding, although the amount so sold is not definitely ascertained, as it is capable of an approximately accurate estimate. (Page 188.)
3. **SAME—MUTUALITY.**—Where a party to a contract not originally bound by it has executed such contract on his part, the other party can not defend upon the ground that the contract was not mutual. (Page 188.)
4. **FRAUDS—STATUTE OF—WAIVER.**—The defense of the statute of frauds is waived unless specially pleaded. (Page 189.)
5. **INSTRUCTIONS—NECESSITY OF SPECIFIC OBJECTION.**—An objection to the verbiage of an instruction must be specific enough to call the trial court's attention to the defects complained of. (Page 189.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; affirmed.

Marsh & Flenniken and *Gaughan & Sifford*, for appellant.

The contract, by reason of its lack of mutuality in the corresponding undertakings of the parties, is unenforceable. 64 Ark. 398; 93 Mich. 491; 29 Am. Rep. 530; 7 Am. & Eng. Enc. of L. (2 ed.), 114; 90 Ark. 509.

Powell & Taylor, for appellee.

The contract is mutual. It is an obligation upon appellee to secure the entire cut of a mill of a specified grade of lumber for a certain period and to deliver it, or have it delivered f. o. b. cars at any point not over fifteen miles from El Dorado, and the correlative and reciprocal obligation on the part of appellant to receive and pay for the lumber when so delivered. 7 Am. & Eng. Enc. of L. (2 ed.), 114; 125 S. W. (Ark.), 659; 40 Minn. 497; 61 Mo. 534; 74 Me. 439; 67 Pac. 347; 108 Ill. 656;

15 L. R. A. 218; 110 Ill. 427; 62 N. E. 367; 155 Fed. 77; 11 L. R. A. (N. S.) 713; 160 Ill. 85; 69 Fed. 773.

If there was any want of mutuality and certainty in the contract, it was cured by Kinard's part performance in securing the output of a mill and delivering lumber to appellant thereunder. 90 Ark. 504; *Rozier v. St. Louis & San Francisco Rd. Co.*, Mo. App. . . ; 73 S. W. 747; 7 Am. & Eng. Enc. of L. (2 ed.) 115; 74 S. W. 724; 83 Ark. 153.

FRAUENTHAL, J. This was an action instituted by the appellee to recover damages for the alleged breach of a contract for the purchase of lumber manufactured by appellee. The appellant, the El Dorado Ice & Planing Mill Company, was the owner of a planing mill situated in El Dorado, Arkansas, and on June 10, 1907, it made the following written contract with appellee:

"This contract and agreement, made and entered into this 10th day of June, 1907, by and between the El Dorado Ice & Planing Mill Company and J. L. Kinard, both of El Dorado, Arkansas, witnesses that the El Dorado Ice & Planing Mill Company bind and obligate themselves, successors and assigns, to pay J. L. Kinard \$13.50 per thousand feet for any entire mill cut of yellow pine lumber grading No. 2 common and better that he may secure from any mill or own himself, except lumber loaded at Urbana, Arkansas; that at \$13.25 during the period of fifteen months. J. L. Kinard agrees to deliver, or have delivered, f. o. b. cars any point not over fifteen miles from El Dorado. If the said J. L. Kinard should secure or manufacture any such entire mill cut of yellow pine lumber grading No. 2 common or better near enough to El Dorado to deliver the lumber at the plant of the El Dorado Ice & Planing Mill Company, in that event they are to pay \$14 per thousand feet. El Dorado Ice & Planing Mill Company bind and obligate themselves, successors and assigns, to pay for all lumber received on cars as soon as the car is unloaded at their planing mill at El Dorado, Arkansas, the time not being over one week from date of bill of lading; and if said lumber is hauled in or on wagons and delivered at the platform of the El Dorado Ice & Planing Mill Company, they are to pay for such lumber at least once each week.

"In witness whereof the parties to this contract have hereunto set their names and seals the day and date above written.

(Signed)

"J. L. Kinard,

"El Dorado Ice & Planing Mill Co."

In pursuance of said contract the appellee secured a saw-mill known as the Caney Lumber Company mill, and located at Upland; and, after making all necessary preparations, began to manufacture and deliver to appellant the kind and grade of lumber mentioned in the contract at the points stipulated therein, and continued to do so until about the 10th day of November, 1907. During said time the said appellant received and accepted the lumber so delivered to it under and in pursuance of the terms of said written contract. On account of the stringency in financial affairs occurring about that time, the appellant requested the appellee to suspend for a time the delivery to it of the lumber under said contract.

There is a sharp conflict in the testimony as to the agreement that was then entered into by the parties. Upon the part of the appellant the testimony tended to prove that the appellee agreed to suspend the delivery of lumber cut by the said mill until financial affairs should improve and money matters become easier, and in consideration of such suspension the appellant did pay to appellee the sum of \$600. On the other hand, the testimony on the part of appellee tended to prove that it was agreed that he should suspend the delivery to appellant of the lumber from said mill during the above named time, and that appellant agreed to receive and accept the entire amount of lumber cut by such a mill then being operated under the terms of the written contract for such time in addition to the time named in the contract as the suspension should last, and in addition thereto to pay to appellee one-half of the feed of his stock or cattle during the time of such suspension; and that appellee agreed to furnish and deliver to appellant such lumber during such time. The testimony on behalf of appellee tended to prove further that in pursuance of said agreement he did suspend the delivery of lumber to appellant for a period of four and a half months, or until about March 20, 1908, and that appellant paid to him \$600 in settlement of one-half of the feed of his stock or cattle during said time; that, in pursuance of

said agreement, he then resumed the manufacture and delivery of said lumber to appellant and continued to do so until about September 10, 1908, when the appellant refused to further receive from him lumber under said written contract or subsequent agreement. About this date the appellee ceased the operation of the Caney Lumber Company sawmill located at Upland, and secured another mill of the same capacity and situated nearer to appellant's plant, and continued the manufacture of lumber of the kind and grade mentioned in said contract, and sought to deliver same to appellant at the points stipulated in said written contract under said parol agreement for the extension of the time of said contract, but appellant refused to further receive the lumber. Thereupon appellee sold the cut of said mill for four and one-half months from said date, the same being for the time of the alleged extension of said contract, at the then prevailing market prices, which were less than the price named in said written contract. He instituted this suit for the recovery in damages of the difference between said contract and market prices of the lumber, and upon a trial of the case he obtained a judgment therefor.

It is insisted by appellant that the above-written contract lacks mutuality, and on this account it is not enforceable. It is urged that by said contract appellant agreed to pay to appellee certain prices for any entire mill cut of certain lumber that he might secure from any mill, but that under the terms of the contract the appellee did not obligate himself to secure the lumber from any mill; that, in effect, it was only an agreement on the part of appellee to furnish the lumber that he might choose to secure from a mill, and that if he did not desire to or did not secure any lumber from a mill he was not under any obligation to do so by virtue of the contract, but that it was entirely optional with him whether he would do so or not. It is further urged that the contract is so indefinite as to the quantity and dimensions of the lumber that the subject-matter thereof can not be approximately estimated, and therefore could not be the basis of an enforceable liability against appellee.

A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise

made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. As is said in the case of *St. Louis, I. M. & S. Ry. Co. v. Clark*, 90 Ark. 504, "mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other. Such are the contracts wherein one promises to buy all that the other may desire to sell; or wherein one promises to sell or deliver all that he may desire or choose to sell or deliver. *Davie v. Lumberman's Mining Co.*, 93 Mich. 491; *Cummer v. Butts*, 29 Am. Rep. 530.

And such, too, is the nature of the contracts wherein the quantity sold can not be made reasonably to appear or is incapable of an approximately accurate estimate. *Campbell v. American Handle Co.*, 117 Mo. App. 19.

But a contract to sell and deliver to another all that one party may require in an established business, or all the product that the other party may produce for a definite period from a certain mill or plant, does impose such a fixed obligation as to save the mutual character of the promise. In such cases the quantity sold can be made to reasonably appear, and is capable of an approximately accurate estimate. And so a contract for the sale of the entire output of a mill of a known capacity for a definite period would be binding, although the amount so sold is not definitely ascertained. *Burgess Sulphite Fibre Co. v. Brownfield*, 62 N. E. 367; *Wells v. Alexander*, 15 L. R. A. 219; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549; *Lewis v. Atlas Mutual Life Ins. Co.*, 61 Mo. 534; *Lima Locomotive & M. Co. v. Natural S. C. Co.*, 11 L. R. A. (N. S.), 713; *Fontaine v. Baxley*, 90 Ga. 416; *Thomas-Huycke-Martin Co. v. Gray*, 94 Ark. 9.

It is not necessary in this case to determine whether or not the written contract lacked mutuality at its inception and was therefore not enforceable because at its inception the appellee had not assumed a fixed obligation on his part; because he acted

thereon and actually made performance thereof up to November 10, 1907; and because thereafter he entered into a verbal contract with appellant by which he did agree to furnish and deliver to appellant the entire cut of a mill of a certain capacity for a definite period, and the appellant did agree to receive same. The testimony on the part of appellee tended to prove such a verbal agreement, and by the verdict of the jury that contract has been established. Where a party, originally not bound, has executed the contract, the doctrine relative to mutuality does not apply. *Fontaine v. Baxley*, 90 Ga. 416; *Louisville & N. Ry. Co. v. Coyle*, 123 Ky. 854; *Hoffman v. Colgan*, 74 S. W. 724; *Bloom v. Home Ins. Co.*, 91 Ark. 367; *L'Amoureux v. Gould*, 7 N. Y. 349; *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. 45. So that appellant became bound for the payment of all lumber which appellee actually delivered under the written contract up to the date of the suspension. Thereafter the parties entered into the verbal agreement. At that time a mill had been secured, and the quantity of its output was known or was capable of approximately accurate estimation. The appellee then agreed in effect to furnish or sell, and the appellant to receive or buy, the entire output of a mill of that capacity at certain prices and for a definite period. That contract imposed an obligation upon both the parties, and was therefore an enforceable agreement.

The question as to whether or not that agreement fell within the statute of frauds, because it was not to be performed within a year and was not in writing, is not raised or presented in this case. A parol agreement is neither illegal or void. The plea of the statute of frauds is a defense which may be waived. It must be specially set up in the answer and relied upon in order to make it available as a defense. And if it is not thus specially pleaded it is waived. *Guynn v. McCauley*, 32 Ark. 97; *Crane v. Powell*, 139 N. Y. 389; *Maybee v. Moore*, 90 Mo. 343; *St. Louis, I. M. & S. Ry. Co. v. Hall*, 71 Ark. 302; 9 Enc. Plead. & Prac. 705.

Complaint is made by appellant as to certain instructions that were given on the part of appellee. This complaint relates to the verbiage of the instruction. No specific objection was made in the lower court to these instructions, nor was the attention of the lower court called to the phraseology of these

instructions which are now criticised. In order for such objection to be available, it was necessary that a specific objection should have been made to the instructions in the lower court, and that court's attention called to the defects that are now urged. *Ark. Midland R. Co. v. Rambo*, 90 Ark. 108; *St. Louis, I. M. & S. Ry. Co. v. Holmes*, 88 Ark. 221; *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 93 Ark. 564; *St. Louis, I. M. & S. Ry. Co. v. Carter*, 93 Ark. 589.

Finding no prejudicial error in the trial of the case, the judgment is affirmed.

RUSSELL v. WEBB.

Opinion delivered July 11, 1910.

1. VERDICT—SUFFICIENCY.—While a verdict should be definite and certain, absolute precision in its wording is not necessary; and if the meaning of the jury can be clearly collected from the verdict, it ought not to be set aside. (Page 193.)
2. EJECTMENT—SUFFICIENCY OF VERDICT.—A verdict in ejectment awarding land to the plaintiff sufficiently describes the land if the description is reasonably certain or can be made reasonably certain so that the land can be identified. (Page 194.)
3. SAME—SUFFICIENCY OF VERDICT.—Where a surveyor surveyed the dividing line between two adjacent proprietors, and placed marks upon the ground which located this line, a verdict which awards to the plaintiff in an ejectment suit the land on the east side of the surveyor's line is sufficiently definite. (Page 194.)
4. EVIDENCE—ADMISSIONS AGAINST INTEREST.—Declarations and admissions of one in possession of land, adverse to his interest, are admissible against him or all who claim under him. (Page 195.)
5. APPEAL AND ERROR—HARMLESS ERROR.—It was not prejudicial error to exclude testimony that was not material. (Page 195.)
6. EVIDENCE—ADMISSION AGAINST INTEREST.—While a recognition of another's title by one who has acquired title by adverse possession will not revest title, proof that the ancestor of the defendant in an ejectment suit recognized plaintiff's title was admissible, though made after such ancestor had had possession for seven years, as it tended to show that the possession of such ancestor was not adverse. (Page 196.)
7. APPEAL AND ERROR—EXCLUSION OF EVIDENCE—PREJUDICE.—Before it can be said that the trial court erred in refusing to permit a witness

to answer a question, it must be shown that a correct and competent question was asked. (Page 197.)

8. EJECTMENT—WRIT OF POSSESSION—PROCEDURE.—Where an officer by a writ of possession is directed to place the plaintiff in possession of certain land as marked by artificial monuments previously placed thereon by a certain surveyor, if it appears by the officer's return that the line has not been correctly placed by such officer, the defendant can apply to the court to have the line established by the surveyor relocated, and for that purpose the court may hear testimony and make appropriate orders. (Page 198.)

Appeal from Pope Circuit Court; *Hugh Basham*, Judge; affirmed.

Brooks, Hays & Martin and *Cockrill & Armistead*, for appellant.

The location of a section line is a question of fact. 77 N. W. 601; 31 Mich. 270. The verdict should have been for appellant. 25 Tex. 594; 4 Tex. 38. The verdict is void for uncertainty. 32 Tex. 330; 32 S. W. 1048; 72 Tex. 5; 19 Tex. 148; 5 S. W. 556; 55 S. W. 379; 40 S. W. 345; 107 Ga. 152; 4 Barr 196. It is the duty of the jury to decide the point in issue. 4 How. 131; 32 La. 1271; 4 Tex. 492; 100 Me. 342; 16 Tex. 18. Webb cannot break the adverse possession of the Russells by proving that at some time Russell, Sr., deceased, had said that he was over the line. 66 Ark. 26; 33 Ala. 380; 108 Ala. 282; 99 Ala. 526; 173 Ill. 564; 67 Minn. 362.

R. B. Wilson, for appellee.

FRAUENTHAL, J. This was an ejectment suit instituted by T. J. Webb, the plaintiff below, to recover a small triangular tract of land situated in the west half of the southeast quarter of section two, in township six north, of range eighteen west, in Pope County. The plaintiff derived title to this land by inheritance back from an ancestor who acquired it in 1853; and he and his ancestors had been since that date in possession thereof, except for a part of the time of the triangular tract in dispute, which for a time has been in possession of defendant and his ancestor. The defendant is the owner of the southwest quarter of section two, in township six north, of range eighteen west, in Pope County, and he derived title to it by descent from his father, who acquired it in 1869; and he and his father have been in possession thereof since said date. The

land owned by the plaintiff and the land owned by the defendant thus joined, and the triangular tract which is involved in this litigation is claimed by the plaintiff to be a part of his 80 acres of land. If the tract of land in dispute is a part of said 80 acres, then the plaintiff has sufficiently proved title thereto by adverse possession up to the time that the ancestor of the defendant took possession of it. The questions involved in this case then, are, first: is the triangular tract of land involved in this litigation a part of the 80 acres of land above described and owned by plaintiff? and, second, if it is, then has the defendant and his ancestor acquired title thereto by adverse possession? It is alleged by the plaintiff that the tract of land in dispute begins at the northwest corner of said west half of the southeast quarter of section two, and runs thence east along the north line thereof a distance of three rods, and runs thence in a southwest direction to a point in the dividing line between said west half of southeast quarter and the southwest quarter of said section two. The defendant alleged that the tract in dispute is located in the southwest quarter of said section two which is owned by him; and he also pleaded that, in event it was located in the above west half of the southeast quarter of section two, he and his father had been in possession of it for twenty years under claim of ownership, and that he had title to it by adverse possession.

Upon the trial of the case there was testimony tending to prove that the defendant's father was in possession of the tract of land in dispute in 1895, and remained in possession of it until his death in 1903, and that defendant then continued in possession of the land until the institution of this suit in 1909. But there was testimony adduced by the plaintiff which tended to prove that the possession by defendant's father of the triangular tract in litigation was not adverse, but was permissive and in recognition of and under the title of plaintiff. The testimony tended to prove that defendant's father had built a house in the northeast part of his 160 acres of land and near the line dividing his land from the plaintiff's 80 acres; that he needed an outlet and wood or horse lot on this 80 acres of plaintiff's land adjoining his house, and that plaintiff permitted him to move his fence upon his land so as to take in the triangular tract

in dispute and to hold the same as a tenant at will of plaintiff; and that the father of defendant thus held the land until his death. The plaintiff also introduced at the trial a witness, W. R. Hale, who qualified as a competent surveyor. This witness testified that he had made a survey of the above lands, and that he had established the line between said west half of the southeast quarter and the southwest quarter of said section two, and had put up monuments fixing its location. He testified that the triangular tract of land in dispute was situated east of said line thus established by him, and was a part of the west half of the southeast quarter of said section two, which was owned by plaintiff. He also made a map or plat of the lands, and showed thereon the line thus established by him and the location of the tract of land involved in this suit.

The jury returned a verdict in favor of plaintiff as follows: "We, the jury, find for the plaintiff the land on east side of the line as surveyed by W. R. Hale."

Upon said verdict the court rendered the following judgment:

"It is therefore adjudged by the court that the plaintiff have and recover of the defendant all that part of west half of southeast quarter of section 2 in township 6 north, range 18 west, in Pope County, Arkansas, which is being held by the defendant, according to the line established by W. R. Hale."

It is urged by counsel for defendant that the verdict of the jury is so uncertain and defective that it can afford no legal basis for a judgment. A verdict should be definite and certain and free from obscurity, but it is not necessary that there should be any absolute precision in the wording of the verdict. If the meaning of the jury can be clearly collected from the verdict, it ought not to be set aside. It is the settled rule that the verdict should be construed liberally, with the view of ascertaining the meaning of the jury and supporting their verdict. And if the issue presented by the pleadings has been substantially decided by the jury, and their meaning can be satisfactorily collected from their verdict, then it is the duty of the court to mould it into proper form by its judgment. In the case of *Woodruff v. Webb*, 32 Ark. 612, this court, quoting from approved authority in speaking of the liberal

construction that should be given to the verdict of the jury, said: "Strict form in a verdict is not required. * * * 'It needs only to be understood what the intent of the jury was, agreeably to which the verdict may afterwards be moulded into form.' * * * 'If the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve according to the justice of the case.'" *Couch v. Harrison*, 68 Ark. 580; *Fagg v. State*, 50 Ark. 506; *Blackshare v. State*, 94 Ark. 548; *Pickett v. Richet*, 2 Bibb 178; *Miller v. Shackelford*, 4 Dana 271; *Burton v. Anderson*, 1 Tex. 93; 22 Ency. Plead. & Prac. 877.

A verdict should show sufficiently what has been awarded to the party in whose favor it has been rendered; and where land is awarded, it should not be so uncertain that a writ of possession could not be issued on it and executed. But the description is sufficient where it is reasonably certain, or where it can be made certain, so that the land can be identified. This certainty may be established by reference to monuments upon the ground or to some recorded map or by some well known and understood manner of location. *Elliott v. Sutor*, 3 W. Va. 37; *Myers v. Ford*, 9 W. Va. 184; *Miller v. Casselberry*, 47 Pa. St. 376; *Meier v. Meier*, 105 Mo. 411; *Leprell v. Kleinschmidt*, 112 N. Y. 364; 15 Cyc. 166.

As shown by the pleadings in the case at bar, the plaintiff alleged that the triangular tract of land in dispute was situated in the west half of the southeast quarter of section 2, township 6 north, range 18 west, in Pope County. Its definite location depended upon the establishment of the line between that 80 acres of land and the 160 acres of the defendant which joined it on the west; this dividing line was the western boundary of the tract of land in dispute. This line was established by the surveyor, W. R. Hale, and he placed rocks, stakes and marks upon the ground which noted and identified the location of the line. The verdict of the jury found that the plaintiff should recover the land on the east side of the line as surveyed by said Hale. Manifestly, the jury meant, from the issue that was presented by the pleadings, that this land was located in the west half of the southeast quarter of said section two. Clearly, this was the meaning of the verdict; and the court rendered its

judgment in conformity with that plain and proper construction of it. We are of opinion that the line established by the surveyor, Hale, has been so definitely located by fixed marks and objects that the description of the land in the judgment is sufficient to warrant the issuance and execution of a writ of possession thereon. We do not think, therefore, that the verdict of the jury was so vague or indefinite as to be void or that the judgment is so uncertain that it should be reversed.

It is urged that the court erred in permitting the introduction of testimony of alleged conversations had with the father of defendant relative to the location of the line between his land and the land of plaintiff, on the ground that the father had died since the time of the alleged conversations. These conversations related to statements made by the defendant's father, from whom he derived his land, relative to the title to the land in dispute, and were in effect admissions adverse to his title thereto. It is well settled that declarations and admissions of one in possession of land, relating to the title thereof and adverse to his interest, are admissible against him; and declarations and admissions of a person, made while in possession, adverse to his title are admissible against his successors in interest and all who claim under him. We do not think the court erred in admitting this evidence. *Jackson v. McCall*, 6 Am. Dec. 343; *Deming v. Carrington*, 30 Am. Dec. 591; *Bushnell v. Church*, 15 Conn. 421.

Nor do we think that the court committed prejudicial error in refusing to permit the witness Ed Neighbors to testify to an alleged conversation had by him with the father of defendant. It appears that Mr. Russell, Sr., was contemplating dividing his land into twenty-acre blocks, and sent the witness for rocks to place at the corners of the blocks. The defendant propounded questions in order to prove by this witness that Mr. Russell, Sr., wanted these rocks to show the lines of his land, and stated that he wanted his son to know his land when he was dead. But the court refused to allow the questions to be answered. In this ruling we do not think that the court was wrong. The defendant did not offer to prove that Mr. Russell, Sr., wanted to show any line that bounded the tract of land in controversy, or that he was in possession of this triangular tract and asserted any title to it. He simply requested to ask of the witness ques-

tions to show that he got rocks to put over his place and to show the lines thereof. But he did not ask whether the rocks were to be placed upon the line of this tract of land in controversy, or to show that Mr. Russell, Sr., was claiming to own the tract. The defendant did not state that he desired to prove by this witness that Mr. Russell, Sr., was in possession of the tract of land in controversy, and, while in possession thereof, made declarations showing the character and extent of his claim to this tract. It was therefore not prejudicial error to refuse to permit the witness to testify as to what Mr. Russell, Sr., stated as to the other lands owned by him, and which are not involved in this case.

We have examined all the instructions that were given, and we think that they correctly presented to the jury the law applicable to the issues in the case. We find no prejudicial error that was committed in the trial; and the judgment is accordingly affirmed.

ON REHEARING.

Opinion delivered October 21, 1910.

FRAUENTHAL, J. Counsel for appellant have filed a motion for rehearing, and therein have suggested certain errors which they urge this court has made in its opinion. We deem it proper to note each of these contentions in order to make clearer our opinion.

In our opinion we stated that appellant urged that the lower court erred in permitting the introduction of alleged conversations had with the father of the defendant relative to the location of the line between his land and the land of plaintiff, on the ground that the father had died since the time of the alleged conversations. Counsel claim that we misunderstood the ground of their objection to that testimony. They now urge that Mr. Russell, Sr., had been in possession of the land in controversy for a longer period than seven years, and that a recognition of the other's title by one who has thus acquired title by adverse possession will not revest title; and that their objection to the testimony relative to these conversations was based upon the ground that they had occurred after the statutory period had run. But the issue involved in this case was whether or not the possession of Mr. Russell, Sr., was adverse or only permissive. He is the person by whom the

possession was held for the statutory period. Testimony, therefore, would be competent to show that such possession was not adverse. Any act or conversation recognizing the claim of the original owner after the seven years' occupancy would tend to show that the possession held during the statutory period was not adverse. Though such testimony is not admissible for the purpose of divesting title out of the adverse occupant and revesting it in the original owner, it is perfectly admissible for the purpose of showing that the possession of the occupant was not adverse, and that the occupant did not acquire title by the possession, which was only permissive. *Shirey v. Whitlow*, 80 Ark. 444; *Hudson v. Stilwell*, 80 Ark. 574.

Counsel insist that it was error to refuse to permit the witness Neighbors to detail certain conversations had by him with Mr. Russell, Sr. Now, before it can be said that the lower court committed an error in refusing to admit testimony, it must be shown that a correct and competent question was asked. In this case it was competent to prove statements made by Mr. Russell, Sr., while in the possession of the land in controversy, as to the nature of his claim thereto and the character of his possession thereof. Mr. Russell, Sr., owned other land than the small triangular tract in controversy. He owned 160 acres of land, according to the testimony. Now, there were only two questions which were propounded to this witness, objections to which were sustained. By the first question appellant desired to prove by this witness that Mr. Russell, Sr., sent the witness for rocks to put over his land; and by the second, that Mr. Russell stated that he wanted his son to know his land when he was dead. Now, these conversations may have referred only to the 160 acres of land which it is conceded that Mr. Russell, Sr., owned. The appellant did not by any question show specifically that Mr. Russell desired to place these rocks on the triangular tract in controversy, or that that tract was the land or a part of the land which he wanted his son to know that he owned. While it may be that it would not have been prejudicial error to have permitted these questions to have been asked and answered, yet, inasmuch as they related to his land generally, and not to the land in controversy specifically, it can not be said that the court committed prejudicial error in not allowing them to be asked.

It is earnestly insisted that the judgment is so indefinite and uncertain in the description of the land recovered that it is ineffective. It is urged that the description therein is so imperfect that a writ of possession issued thereon can not be executed. This contention gave us no little concern on the original hearing of this appeal, and has given us great concern on this application for a rehearing. We have, however, concluded that the description is not so imperfect that a writ issued thereon can not be executed. The main question involved in the case was whether or not the defendant had acquired title to the land in controversy by adverse possession. It was determined that the defendant had not acquired title thereto by adverse possession, and it was found by the jury that this tract in dispute was a part of the west half of the southeast quarter of section 2, in township 6 north, range 18 west. The western boundary of this tract in dispute was the line between the said west half of the southeast quarter and the southwest quarter of said section 2. The survey of the United States Government fixed that line, and the surveyor, Hale, located it. He located the southern and northern extremities of the line, and noted them on the ground with sufficient definiteness by reference to fixed objects. Between these points he put stakes at certain distances apart. These markings thus made by the surveyor on the ground may be removed; but any monument he may have placed on the line might be removed. If he had erected mounds, they might be removed. He did locate the line which he established, and marked its location on the ground. The officer into whose hands the writ of possession may be placed can, we think, locate that line on the ground thus marked by the surveyor. If he can not or does not, the appellant is not without remedy. The court issuing the writ of possession has full and complete control over its process, and if upon the return thereof it is made to appear that the line has not been correctly located, the appellant can then have the line thus established by Hale located at the points and along the places which were actually noted by the surveyor, Hale, on the ground, by evidence introduced before the court out of which the writ issued. The court can then hear testimony as to the true location of the line that was established

by the surveyor, Hale. If, then, the officer in executing the writ has taken possession of more land than was specifically recovered, the court can order a restitution thereof. Warvelle on Ejectment, § 520.

After the rendition of the opinion on the original hearing appellant filed a motion for a writ of certiorari for the purpose of bringing up the original map introduced in evidence, the object being to show that a house now appearing upon the map in the transcript does not appear upon the original. But, inasmuch as the noting of this house upon the map in the transcript was not controlling in our opinion, the motion for the writ is denied.

The motion for a rehearing is denied.

TRIGG v. DIXON.

Opinion delivered October 31, 1910.

1. MUNICIPAL CORPORATIONS—POWER TO LICENSE BUTCHERS.—A municipal ordinance requiring butchers to take out a license and requiring their meats to be inspected is a valid exercise of power given by Kirby's Digest, § 5438, to cities and towns to "regulate markets," and by § 5468 "to prevent or regulate the carrying on of any trade, business or avocation of a tendency dangerous to morals, health or safety." (Page 201.)
2. SAME—REASONABLENESS OF LICENSE.—An annual fee of fifty dollars for a butchers' license required by a municipal ordinance is not unreasonable. (Page 202.)

Appeal from Miller Chancery Court; *James D. Shaver*, Chancellor; reversed.

J. F. Simms, for appellant.

1. The city had the authority to pass the ordinance in question. Kirby's Digest, §§ 5438, 5528-29, 5648, par. 4. The term "butcher" or "butcher shop" is embraced in the word "market." 73 Mich. 661. It is unreasonable to assume that the Legislature had only in view the regulation and superintendence of public markets, in the technical sense of the word, as distinguished from "butcher shops." 58 Pa. St. 119; 60 Pa. St. 445; 20 Am. Law Reg. (N. S.) 473, and note; 1 Dill., Mun. Corp. (4 ed.), par. 380; 28 Cyc. 734, and note 36; 60 Mo. App. 365. Power to "establish and regulate markets," even when standing alone, implies au-

thority to prohibit elsewhere than at duly established markets the sale of articles falling within the exercise of the police power. 3 Johns. (N. Y.) 418; 10 Wend. 100; 82 N. Y. 318; 21 Tex. App. 71; 10 Bush 643; 44 Mo. 547. The power to regulate includes the power to license. 41 Ark. 485; 43 Ark. 82; 88 Ill. 221; 20 Am. Rep. 545. All reasonable presumptions are indulged in favor of the validity of an ordinance. 88 Ark. 301; 52 Ark. 301; 64 Ark. 152. And where an ordinance is passed which would be invalid if intended for one purpose and valid if intended for another, the presumption, in the absence of a clear showing to the contrary, is that it was intended for the lawful purpose. 36 Pa. Sup. Ct. 598; 230 Ill. 80; 82 S. E. 615.

2. The license fee is reasonable, taking into consideration the regulation and inspection provided for and in contemplation of the ordinance. 26 Pa. Sup. Ct. 343; 70 Ala. 361; 2 Am. & Eng. Corp. Cases, 23; 52 Ark. 301; 7 So. 885; 23 Am. St. Rep. 558; 9 L. R. A. 69.

HART, J. Appellees by this suit seek to enjoin the appellant from enforcing an ordinance of the city of Texarkana. The ordinance is as follows:

"An ordinance to declare the selling of fresh meats in the city of Texarkana, Arkansas, a privilege, to require and fix a license to engage in such business, and to better regulate the sale of fresh meats in this city:

"Be it enacted by the council of the city of Texarkana, Arkansas:

"Sec. 1. That hereafter all persons keeping butcher shops and all dealers in fresh meats in the city of Texarkana, Arkansas, selling in quantities less than a quarter shall take out a license and pay therefor the sum of fifty dollars per annum.

"Sec. 2. Any persons who shall sell fresh meats within the city of Texarkana, Arkansas, to consumers or others in less quantities than a quarter shall be regarded as a butcher, and be subject to and required to take a butcher's license.

"Sec. 3. Until such time as the city council of this city shall appoint a meat inspector and define his duties, the duty of such inspector shall devolve upon the chief of police, and it shall be his duty to inspect any and all fresh meats sold by such persons and any person who shall sell or offer for sale any fresh meats

which may have been pronounced unwholesome or unfit for sale by said chief of police shall, upon conviction thereof in the police court, be fined in any sum not exceeding fifty dollars.

"Sec. 4. Any person who shall engage in or carry on the business of a butcher, as defined in this ordinance, without first having applied for and obtained a license therefor shall upon conviction be fined in any sum not less than five nor more than fifty dollars.

"Sec. 5. That all ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed, and this ordinance shall take effect and be in force from and after the first day of January, 1910."

Texarkana is a city of the first class, and has within its corporate limits fifteen retail butcher shops. H. W. Trigg, as chief of police, attempted to enforce the provisions of said ordinance. Appellees are among the number engaged in and carrying on the business of butchers in said city, and are subject to the terms of said ordinance. They refused to comply with the terms of the ordinance on the ground that it was void and should not be enforced because it shows on its face that it is an ordinance passed to raise a revenue for said city, and was not passed for the regulation of said business; and because the sum of \$50 per annum is an unreasonable exaction for said purpose. Hence, as above stated, appellees brought this action in chancery to enjoin appellant from enforcing said ordinance. The decision of the chancellor was in their favor, and from the decree entered an appeal has been duly prosecuted.

We hold that the ordinance is valid. Under section 5438 of Kirby's Digest, cities and towns have the power "to establish and regulate markets;" and under section 5648, subdivision 4, cities of the first class have authority "to prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health or safety," etc. Under the power to regulate, a city may make proper police regulations as to the mode in which the business shall be carried on. Dillon on Municipal Corporations (4 ed.), § 358.

Regulations in respect to the selling of fresh or butcher's meats have relation to health and disease. *Kinsley v. Chicago*, 124 Ill. 359; Dillon on Municipal Corporations, § 396.

In the case of *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 279, the court said: "It occurs to us that if there is any kind of business transacted in a city 'which is liable in and of itself to become a nuisance or injurious to the public, if not properly supervised or carried on,' or which 'may become offensive,' or which is a legitimate subject of 'sanitary regulation,' it is pre-eminently this very business of vending fresh and butcher's meats."

The power to regulate includes the power to license as a means of regulating. *Helena v. Miller*, 88 Ark. 301, and cases cited. Therefore, we are of the opinion that the city of Texarkana has the power to require all butchers doing business within its corporate limits to be licensed under the sections of the statute above referred to.

This brings us to the question of whether the license fee fixed by the ordinance is reasonable. In discussing this question in the case of *Fayetteville v. Carter*, 52 Ark. 301, the court said: "They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expenses of the municipal supervision made necessary by the business in a city or town where it is licensed. A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business, may be required." This rule was quoted with approval in the case of *Helena v. Miller*, *supra*, and the court said: "It is our duty to indulge every reasonable presumption in favor of the validity of the ordinance, and not to declare it void unless it plainly appears to be so."

In the case of *St. Paul v. Colter*, *supra*, where an ordinance fixing the annual license of a butcher at the sum of \$200 was held valid and the fee reasonable, the court said:

"We think it was entirely legitimate for the council, in fixing the sum which should be required for a license, to look at numerous considerations; perhaps among others at the probability that the city might be put to great expense in litigation, and to other expenses arising out of this business."

In the present case there were approximately fifteen butchers in various parts of the city affected by the ordinance. It was

made a part of the duties of the chief of police to inspect all fresh meats sold by them. The butchers were prohibited from selling any fresh meats which were pronounced unwholesome or unfit for sale by the chief of police, and the enforcement of the ordinance was provided for by fine in the police court. Considering the nature of the business, the amount of time and expense necessarily required for a proper supervision of it and the consequent benefit to the health of the inhabitants of the city thereby, it can not be said that the license fee required in this case is unreasonable.

The decree will be reversed, and the cause dismissed.

STATE v. WRIGHT.

Opinion delivered October 31, 1910.

1. CRIMINAL LAW—FORMER CONVICTION.—A plea of former conviction of gaming to an indictment for gaming on a particular day is not sustained by proof that defendants were charged in the police court with gaming on or about such date, and that they pleaded guilty to such charge. (Page 205.)
2. SAME—PLEA OF GUILTY—SENTENCE AT SUBSEQUENT TERM.—Where a plea of guilty is entered, sentence may be pronounced at a subsequent term. (Page 205.)

Appeal from Washington Circuit Court; *Daniel Hon*, Judge on exchange of circuits; reversed.

STATEMENT BY THE COURT.

On the 5th day of November, 1909, the grand jury of Washington County returned an indictment against each of the appellees, charging him with the offense of gaming on the 17th day of October, 1909, and by consent the cases were consolidated and tried together before the circuit court sitting without a jury.

Appellees entered a plea of former conviction, which was sustained by the court, and the State has appealed.

The cases were tried in the circuit court at its May term, 1910. Two of the appellees were introduced as witnesses by the State, and testified that all the appellees had committed the crime of gaming in the city of Fayetteville, in Washington County, on

divers and sundry days during the four or five months preceding the 17th day of October, 1909.

The appellees, to sustain their plea of former conviction, introduced witnesses to prove the following state of facts:

On the 17th day of October, 1909, the chief of police saw the appellees gaming in the city of Fayetteville, and reported them to the city attorney. On the 25th day of October, 1909, the city attorney filed an affidavit in the police court of said city, charging each of appellees with the offense of gaming on or about the 17th day of October, 1909. A warrant of arrest was issued and served upon appellees on the same day. The appellees appeared in the police court on the same day, and entered their pleas of guilty, but, the city attorney being absent on account of attendance in the circuit court, judgment was not pronounced; and the court announced that the cases would be continued from day to day until the city attorney could be present. On the 11th day of November the city attorney and the appellees appeared in the police court. The pleas of guilty of appellees were not withdrawn, but two of the appellees were sworn and examined as witnesses. They testified that all of the appellees had committed the offense of gaming on the 17th day of October, 1909. They also testified that all of the appellees had been guilty of gaming on divers and sundry occasions within the four or five months preceding that time. They gave the dates and place where this occurred. The police court did not require the city attorney to make an election, and said that it was his custom in cases of this kind to examine witnesses and find out about the nature and extent of the crime committed. He said that, while he knew that indictments had been returned against appellees charging them with gaming, he did not try to bar indictments in the circuit court.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellant.

By their plea in the mayor's court, the defendants only confessed themselves to be guilty of the crime of gaming on the 17th day of October, 1909. 12 Ark. 169. To render the plea of former conviction availing, the court must not only have jurisdiction, but the proceedings must be regular. 32 Ark. 726; 56 Ark. 367; 70 Ark. 74; 48 Ark. 34. See also 42 Ark. 35; 43

Ark. 70; *Id.* 372; 94 Ark. 211. The proceedings in the mayor's court, the form of trial there gone through, notwithstanding the plea of guilty previously entered, were but a mere evasion, not in good faith, but intended to bar indictments pending in the circuit court.

Walker & Walker, for appellees.

The police court acquired jurisdiction prior to the finding of the indictment, and, the charge being gaming on or about the 17th day of October, 1909, and the proof showing all the games played by the defendants within one year next preceding, and no election having been made, the conviction in the police court was a bar to the indictments, and the plea was properly sustained. 65 Ark. 38; 72 Ark. 419.

HART, J., (after stating the facts). To sustain the finding of the court below in their favor on their plea of former conviction, appellees rely upon the cases of *Bryant v. State*, 72 Ark. 419, and *Deshazo v. State*, 65 Ark. 38. But we do not think the rule announced in those cases is applicable to the state of facts presented in this record. There no plea of guilty had been entered, and the State to secure a conviction elected to introduce evidence generally as to all illegal sales of liquor made by the defendants within one year of the finding of the indictment. There was nothing to show what particular sales were relied upon to obtain a conviction. The court held that this state of the record brought the cases within the rule announced in *State v. Blahut*, 48 Ark. 34, that "it is the established rule that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the indictment in the first case."

The record in this case presents an essentially different state of facts. The appellees were charged before the police court with the offense of gaming on or about October 17, 1909. They entered their plea of guilty to the charge. It was not necessary to introduce evidence to secure their conviction, and no circumstances could mitigate or aggravate the offense.

After a plea of guilty is entered, no finding is necessary, and the judgment follows the plea. This necessarily follows from the decisions in the cases of *Thurman v. State*, 54 Ark. 120, and *Green v. State*, 88 Ark. 290, where it is held that sentence may

be pronounced upon a plea of guilty at a term of the court subsequent to that at which the plea was entered. The reason for this is that a plea of guilty is equivalent to a conviction, and the court must pronounce judgment and sentence as upon a verdict. See Clark's Criminal Procedure, par. 129.

The court erred in sustaining appellee's plea of former conviction; and the judgment must be reversed, and the cause remanded for a new trial.

WESTERN COAL & MINING COMPANY v. MOORE.

Opinion delivered October 31, 1910.

1. MASTER AND SERVANT—ASSUMED RISK.—Where an experienced miner was injured by the fall of an overhanging rock, which was defectively propped, it was error to instruct the jury that if he knew the dangerous condition of the rock but did not appreciate the danger therefrom he did not assume the risk, since if he knew that the rock was defectively propped he must also have known that it was dangerous for him to go under it. (Page 209.)
2. INSTRUCTIONS—REFUSAL OF SPECIFIC INSTRUCTION.—It is error to refuse to give a specific instruction clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted. (Page 212.)
3. SAME—PRESENTING APPELLANT'S THEORY.—It was error to refuse an instruction which properly presented appellant's theory of the case. (Page 212.)
4. MASTER AND SERVANT—PRESUMPTION OF NEGLIGENCE.—In the absence of a statute to that effect, no presumption of negligence arises from the fact that an employee is injured while at his work. (Page 212.)
5. INSTRUCTIONS—REPETITION.—It is not error to refuse to repeat instructions. (Page 212.)
6. MASTER AND SERVANT—ASSUMED RISK.—Where a mine owner delegates to a servant the duty to inspect the car track and entries in the mine, and to report their unsafe condition to the mine foreman, and the servant neglected to perform this duty, he assumes the risk of injury from his negligence. (Page 212.)

Appeal from Crawford Circuit Court; *Jephtha H. Evans*, Judge; reversed.

Ira D. Oglesby, for appellant.

1. The testimony showed that the accident occurred by reason of one of the props being knocked down by a lump of coal on

a car striking. Appellee is bound by the allegation of negligence specifically stated in his complaint. 127 S. W. 603. The negligence alleged is not sustained by the proof.

2. There was evidence to sustain instructions 9, 10, 11 and 12, requested by appellant, and they should have been given. It is error to refuse to give a specific instruction clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given. 82 Ark. 499.

Sam R. Chew, for appellee.

1. The proof fully sustains the verdict both as to the fact of negligence and the allegations of negligence specifically alleged.

2. Considering the instructions as a whole, they were fair to both parties, and are sustained by former decisions of this court. 44 Ark. 555; *Id.* 524; 51 Ark. 467; 48 Ark. 333; 77 Ark. 1; *Id.* 367; *Id.* 556. The modification of instruction No. 3 was warranted by the doctrine announced in 77 Ark. 367. The principles of law embodied in instructions requested by appellant are covered by those given. As to instructions 8 to 12 inclusive, there was no proof on which to predicate them. The proof shows positive knowledge on the part of appellant of the condition of the rock. Upon this proof, and the whole record, the verdict is right, and the judgment should be affirmed, even if error may have occurred in giving or refusing instructions. 10 Ark. 9; *Id.* 53; 4 Ark. 525; 26 Ark. 373; 64 Ark. 238; 72 Ark. 623.

HART, J. Idus Moore recovered judgment against the Western Coal & Mining Company for injuries sustained by him in the defendant's coal mine. The plaintiff was a driver boss for defendant, and was injured by a fall of a rock while riding upon a pit car being drawn over the track in one of the entries of the mine. The negligence alleged in the complaint is as follows:

"That said rock or stone in the roof or top of said mine and entry required props to be placed under it so as to keep said rock in place in said top or roof and prevent same from falling from said top or roof; that the defendant neglected, failed and refused to put a sufficient number of props under said rock or stone to hold it and keep it from falling; that it only kept two props under said rock or stone, and that these props were too weak and unsound to support and keep said rock from falling; that

by reason of the weakness and unsoundness of said props the said rock or stone through the weight crushed and broke said props, thereby allowing same to fall as aforesaid and injure plaintiff as aforesaid; and plaintiff says that the defendant knew of said carelessness and negligence and wrongful management, or by the exercise of ordinary care and caution upon its part could have known of said carelessness and negligence and wrongful management."

According to his testimony, the plaintiff was injured on December 29, 1908, while discharging his duties as boss driver in defendant's coal mines. He said that his duties as boss driver were to take charge of the haulage of coal, and of the drivers, mules and cars engaged in getting out the same; that he had nothing to do with the roof props, but that it was the duty of the pit boss or his assistant to inspect and look after these. The plaintiff was knocked senseless, and did not remember any of the circumstances attending the injury; but other witnesses for him testified that he was found on a loaded coal car, which was being drawn along the entry, and that he was pinned down and crushed by a rock which had fallen from the roof of the entry; that it was about two and a half feet from the roof of the entry to the top of the car where plaintiff was found; that the rock was about nine feet wide, eight feet long and averaged six inches thick. The rock extended across the roof. Under the rock was found one small prop, which was about five inches thick and about four and a half or five feet long. It had been cut about half in two where the cars had hit it. The rock before it fell rested upon two props and the "gob," which is described to be a pile of slate and other waste from the mines.

One of the plaintiff's witnesses, on cross examination, stated that there was a prop on each side of the rock and one in the center. He also testified that he had made complaint to the pit boss about the dangerous condition of the rock in question, and that the pit boss had promised to have the defect in the props repaired, but that he had not done so. This complaint was made about two and a half months before the accident happened.

On behalf of the defendant, William Powell testified as follows:

"That at the time plaintiff was injured he was a driver in defendant's mine, pulling a loaded trip along said entry, the plaintiff being on one of the loaded cars; that no other person was present at the time of the accident except plaintiff and himself. The plaintiff was injured by a rock falling upon him, which fall was caused by one of the props being knocked down by a lump of coal on one of the cars projecting over the side of the car; that one of the loaded cars of coal struck one of the props above stated and knocked it out, which caused the rock to fall and injure plaintiff; that the props under the rock had been there for some time, and the cars had all times prior to this safely passed the props, there being sufficient room between the loaded cars and the props; that he passed under the rock which fell many times during the day with loaded and empty cars; had occasion to observe the condition of the rock and of the props, and at no time saw any evidence of the rock being loose or that the props were in any way weak, unsound or insufficient to securely hold said rock and support the roof, and could have done so if this condition existed.

"The plaintiff was boss driver in defendant's mine at the time, and his duties carried him under the place where the accident occurred very frequently, and it was a part of plaintiff's duty to notice the condition of the roof and of the props sustaining same; and, if any part of the roof became loose or gave any evidence of falling, or if the props were insufficient, either as to size or number, it was plaintiff's duty to report this condition to the pit boss and have the rock secured. That he is not in the employ of defendant, or in any way interested in this suit."

"The defendant also adduced other evidence tending to show that it was the duty of the boss driver to look after the entries and track; and if it is out of order or a rock found to be dangerous for drivers to pass under, it is his duty to make it safe or inform the mine foreman, so that he may do so.

The counsel for the defendant assigns as error the action of the court in giving over his objections the following instruction:

"8. If plaintiff knew of the defective and dangerous condition of the rock in question, if it was defective and dangerous, or as a reasonable, prudent and careful man ought to have known it and appreciated the danger to himself therefrom, and yet went

under or near the rock, he assumed the risk of injury, and can not recover. But if he knew, or ought to have known, that the rock was in a dangerous condition, if it was, and yet did not appreciate the danger to himself therefrom, he did not assume the danger himself, and is not barred from recovering by reason of assuming the risk."

Counsel for defendant contends that the error in the instruction is in the words, "and yet did not appreciate the danger to himself therefrom." He urged that if it was proved that the plaintiff knew of the dangerous condition of the rock in question, it could not be said that he did not appreciate the danger to himself therefrom.

Counsel for the plaintiff contends that the instruction was warranted under the rule announced in the case of *Choctaw, Oklahoma & Gulf Rd. Co. v. Jones*, 77 Ark. 367. But in that case the court was discussing the law applicable to an essentially different state of facts. There the court, in considering a case where the danger was brought about by the negligence of the master, said:

"The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further, and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constituted an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of or assumed it." Continuing, the court said, at page 376: "But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work."

In the case of *St. Louis, I. M. & S. Ry. Co. v. Corman*, 92 Ark., at page 108, the court said: "An employee by his contract of service impliedly agrees to assume and bear the risk of all

dangers from the ordinary incidents of the service, but these do not include the dangers arising from negligent acts of his employer, unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the service. Of course, if a person of ordinary intelligence is aware of a danger, he is presumed to appreciate it; but it does not necessarily follow that because one becomes aware of a negligent act he appreciates the danger arising therefrom."

The difference in the two classes of cases is this: Where a servant is ordered by his master to do an act, he can not be said to have assumed the risk of the unusual peril to which he is subjected unless he knows and appreciates the danger, or unless such danger is obvious for the reason that in such cases the servant has a right to assume that he is not sent into any unusual peril. But where the servant is not working under the direct supervision of the master, and where the defects connected with the service are open and obvious alike to the master and servant, and the servant of his own volition continues in the service, he assumes the risk.

In such a case it can not be said that the servant knows of the danger, but yet does not appreciate it.

In the present case, it appears from the record that the plaintiff was a miner of many years' experience. He was familiar alike with the necessity for propping the roof of the mines, the methods employed in doing so, and the dangers incident to insufficient or defective props, and certainly it can not be said that he knew the rock was in a dangerous condition, and yet did not appreciate the danger to himself in passing under it. He might have known of the condition of the rock, without appreciation of the fact that its condition was dangerous; but it can not be said that he knew it was dangerous, and did not appreciate the danger.

We think the instruction was misleading and prejudicial, and that the court erred in giving it. We call attention to the fact that other instructions are open to the same objection, in order that they may be corrected upon a retrial of the case.

2. It is also contended by counsel for defendant that the court erred in refusing to give at his request the following instruction:

"12. If the evidence shows that the accident was not caused by reason of the roof or rock which fell not being suitably propped, but was caused by a lump of coal which projected over the side of the car which struck the prop and knocked it down, thereby causing the rock to fall, then plaintiff is not entitled to recover under his complaint in this action." This should have been given.

"It is error to refuse to give a specific instruction clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted." *Western Coal & Mining Co. v. Buchanan*, 82 Ark. 499, and cases cited.

It was the theory of the defendant that the accident was caused by a lump of coal which projected over the side of the car, and which struck the prop and knocked it out, thereby causing the rock to fall. Evidence was adduced by it at the trial to sustain this contention, and defendant had a right to have this theory of the case presented to the jury in a concrete form.

3. The court modified instructions No. 3, asked by defendant, by striking out that part of it which in effect told the jury that negligence on the part of the defendant could not be inferred merely from the occurrence of the accident. While it is true that, in the absence of a statute to that effect, no presumption of negligence arises from the fact that the plaintiff was injured (see *St. Louis & S. F. Rd. Co. v. Wells*, 82 Ark. 372; *Fordyce v. Key*, 74 Ark. 19; *St. Louis & S. F. Rd. Co. v. Hill*, 79 Ark. 76), yet we would not reverse the judgment in the present case on account of the court striking out of the instruction the words in question because the omitted part was given to the jury in other parts of the court's charge; and it was useless to repeat it in the instruction asked.

4. In view of the retrial of this case, we desire to call attention to a matter that seems to have been overlooked in the former trial. It was the contention of the defendant that it had delegated to the plaintiff the duty to inspect the track and entries, and make the same safe, or to report their unsafe condition to the mine foreman. This theory of the defendant was ignored in the instructions given by the court, and in respect to this omission we call attention to the case of *Southern An-*

thracite Coal Co. v. Bowen, 93 Ark. 140. The plaintiffs were injured by the fall of a cage in a shaft of defendant's mine. The plaintiffs alleged that the injury was caused by the defendant's failure to securely fasten the wire cable that held the cage. The defendant contended that it had delegated to one of the plaintiffs the duty of fastening the cable or wire rope. The court held that one of the instructions was erroneous and prejudicial to the rights of the defendant because it ignored the evidence of the defendant tending to prove that it was the duty of one of the plaintiffs to fasten the wire rope, and said:

"If appellant (defendant) deputed to Thrasher (plaintiff) the duty of making the wire rope secure, and he neglected to perform this duty, he assumed the risk of injury from his negligence in failing to discharge the duty imposed on him, and the master is not liable to him for the injury resulting." See also *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 93 Ark. 564.

5. It is also contended by counsel for defendant that the evidence does not support the verdict; but, in view of a retrial of the case, it is sufficient to say that we do not agree with his contention, and are of the opinion that the evidence warrants the verdict.

For the errors indicated, the judgment must be reversed, and the cause remanded for a new trial.

WESTERN UNION TELEGRAPH COMPANY v. ARCHER.

Opinion delivered October 31, 1910.

1. TELEGRAPH COMPANY—REGULATION AS TO FREE DELIVERY LIMITS.—A telegraph company may, by reasonable regulations, fix the limits for each of its stations within which it will deliver telegrams without extra charge, and beyond which it will exact extra compensation for their delivery. (Page 216.)
2. SAME—OBLIGATION TO DELIVER MESSAGE.—Where a telegraph company undertakes for an agreed consideration to deliver a message beyond its free delivery limits, it will be bound by such undertaking, though it may be required to pay more than the amount received to secure a messenger to make such delivery. (Page 217.)

Appeal from Clark Circuit Court; *Jacob M. Carter*, Judge; affirmed.

Geo. H. Fearons, J. H. Crawford and Rose, Hemingway, Cantrell & Loughborough, for appellant.

Callaway & Huie, for appellee.

FRAUENTHAL, J. This was an action to recover damages for mental anguish which appellee alleged she sustained by reason of the negligent failure of appellant to promptly transmit and deliver to her a telegram. On January 17, 1909, a telegram was delivered to appellant's agent at Graysonia, Arkansas, addressed to appellee at Wynne, Arkansas, reading: "Come at once; Amanda is very sick." The appellee was the mother of Amanda, the person described in the telegram, and who was the wife of J. T. Hampton, the person whose name was signed to the telegram. On said day appellee was at the home of her son-in-law, W. R. Fisher, who resided about one and three-quarter miles from Wynne, Arkansas, and the telegram was addressed to her in his care. The telegram was delivered to the agent of appellant at Graysonia by a son of "Amanda," mentioned in the telegram. He testified that he told the appellant's agent that the person referred to in the telegram as "Amanda" was the daughter of the addressee, and that W. R. Fisher, the person in whose care the telegram was sent, lived about one and one-half miles from Wynne, and that appellee was then residing with him. His testimony tended to prove that appellant's operator required a payment of fifty cents for the transmission of the message without special delivery, and that he required the payment of an additional sum of twenty-five cents for the special delivery of the message to the residence of Mr. Fisher, located outside of Wynne, and that the sum required for the special delivery was paid in addition to the sum required for the transmission of the telegram; and that the appellant's operator then accepted and agreed to transmit and deliver same for said sums. The telegram was sent on Sunday about 9 o'clock A. M. The appellant's operator at Wynne testified that the telegram was received by him at 3 o'clock P. M. of the same day; that after some inquiry he learned that W. R. Fisher lived about one and three-fourths miles from Wynne, which was outside the free delivery limits at that station; that thereupon he endeavored to notify the sending office

that the necessary special messenger fee for delivery of message should be paid or guaranteed, but that, on account of the day being Sunday and some intermediate office closed, he did not receive a reply until Monday morning; and that the reply was that the necessary special delivery charge would be guaranteed up to \$1.50; that thereupon the telegram was sent out by special messenger and delivered on the morning of that day, and that he paid to the messenger 75 cents for that service.

The testimony tended to prove that, if the telegram had been promptly delivered when received at Wynne, the appellee could and would have reached the bedside of her daughter at 12 o'clock noon on Monday; but that on account of the failure to deliver the message to her promptly she was unable to reach her daughter until Tuesday at noon. In the meanwhile, it was necessary that her daughter should undergo an operation which was being postponed awaiting appellee's arrival. Deeming it unwise to wait longer, the attending physician began to administer medicine for the operation so that the daughter lost consciousness a few hours before the arrival of appellee, and died shortly afterwards without regaining consciousness. Had the telegram been delivered to appellee promptly, she could and would have arrived at the bedside of her daughter from twenty to twenty-four hours before she became unconscious.

Upon the request of appellee the court gave, amongst other instructions, the following:

"2. You are instructed that if you believe from the evidence that Henry Hampton delivered the telegram in question to defendant's agent at Graysonia, and deposited such funds as said agent said was necessary for its prompt transmission and delivery, and that said defendant's agent agreed to and did undertake, by virtue of said agreement, to transmit and deliver said message, but that same was delayed by the negligence of said defendant's agents, and such delay caused the plaintiff to be delayed about twenty-four hours in reaching the bedside of the person referred to in the telegram, and that she suffered mental anguish because of such failure, then you will find for the plaintiff."

The court refused to give the following instruction requested by appellant:

"If you find from a preponderance of the evidence in this case that the sender of the message to the plaintiff delivered said message to defendant's manager at Graysonia, on Sunday, the 17th day of January, 1909, to be transmitted to the plaintiff at Wynne, Arkansas, and that the said message reached Wynne promptly soon after it was received at Graysonia, and that the defendant's manager at Wynne ascertained that the plaintiff and the said W. R. Fisher, in whose care the message was sent, resided one and three-fourths of a mile or more from the defendant's telegraph office at Wynne, and that the said town or city of Wynne contained less than 5,000 inhabitants, and that the necessary special messenger delivery fee had not been paid or guarantied by the sender of the said message, through the defendant's Graysonia office, and that the defendant, in good faith, endeavored to secure the payment or guaranty of the special delivery fee, on Sunday evening, January 17, 1909, by sending service messages back to the Graysonia office, and that, on account of the day being Sunday, the manager of the defendant at the Graysonia office was not in his office, and for that reason did not receive the said service message until Monday, the 18th day of January, 1909, and that as soon as the special delivery messenger fee was paid or guarantied a special messenger was sent with the message, who delivered same promptly soon thereafter, then your verdict should be for the defendant."

A verdict was returned in favor of appellee for \$650, and from the judgment entered thereon this appeal is prosecuted.

It is urged by counsel for appellant that the lower court committed an error in refusing to give the above instruction asked by it. But, under the circumstances of this case, we think that the instruction was misleading, and not a correct statement of the law as applicable to the issue made herein and presented by the testimony adduced in the trial of the case. The appellant contends that the appellee resided without the limits fixed for the free delivery of messages at its office at Wynne, and that, as soon as the necessary special fee for the delivery outside said limits had been guarantied, it promptly delivered the message. But the real question to be settled by the jury in this case was, not whether the special fee suggested by the receiving operator or by any rule of the telegraph company as

necessary for the delivery of the telegram was guaranteed, but whether or not the sender of the telegram paid to the sending operator the amount asked by him as the extra charge for the delivery of the message, and whether or not the sending operator accepted such extra charge, and therefor agreed to deliver the message, in addition to transmitting it. A telegraph company may, by reasonable regulations, fix the limits for each of its stations within which it will deliver telegrams without extra charge, and beyond which territory it may exact extra compensation for all deliveries made. It may thus prescribe that it will not be under any obligation to deliver the message beyond the free limits if the extra payment is not made. Jones, Telegraph & Telephone Companies, § 296.

But the obligation which the telegraph company assumes relative to the delivery of the message is determined by the contract it makes at the time it accepts the message for transmission. It may specially agree to carry the message beyond its free delivery limits, and when it does so it incurs all liability growing out of a failure to observe such agreement. And where it undertakes to deliver a message beyond such free limits for an agreed consideration, it will be bound by such undertaking, although it may be required to pay more than the amount received to secure a messenger to make such delivery. It becomes obligated by its contract to deliver for the extra charge agreed upon, and it is not absolved from such obligation because the special fee accepted by it is not sufficient or is not the amount necessary to secure a messenger to make such delivery. 2 Joyce on Electric Law, § § 768, 762; 27 Am. & Eng. Enc. Law, 1030; *Western Union Tel. Co. v. Matthews*, 67 S. W. 849; *Western Union Tel. Co. v. O'Keefe*, 29 S. W. 1137; *Western Union Tel. Co. v. Teague*, 36 S. W. 301; *Western Union Tel. Co. v. Warren*, 36 S. W. 314.

The testimony on the part of appellee tended to prove that the operator of appellant at Graysonia agreed to transmit the telegram for 50 cents and to deliver it for the extra charge of 25 cents; and that these requirements for the transmission and also for the delivery of the message were complied with by the sender. If that contract was made, the appellant was bound thereby, and thereby obligated itself to both transmit and deliver

the message for those charges. It appears from the testimony on the part of appellant that its operator at Wynne, either because he had not been notified that the extra charge for delivery had been arranged or for other reason, did not deliver the message promptly upon its receipt by him, but made demand for a guaranty of delivery charges up to \$1.50, and thereafter paid 75 cents to a messenger which he testified was necessary to secure the special messenger to make the delivery. Now, by the above instruction requested by it, the appellant asked the court to instruct the jury in effect that the appellee could not recover if "the necessary special messenger delivery fee had not been paid or guarantied by the sender of the said message." From this the jury might have understood that, before the appellee was entitled to recover, the sender must have paid for the extra charge for delivery the sum of 75 cents, the amount which the operator at Wynne found necessary to pay to the messenger to deliver the telegram, or the sum of \$1.50, the amount which was asked to be guarantied. But that would not be a correct statement of the law applicable to this case. For, if the operator at Graysonia agreed to deliver the message for the extra charge of 25 cents, then the appellant was under obligation to make the delivery. The question therefore to be determined by the jury was, not whether "the necessary special delivery fee" was paid, but whether or not the sender of the message actually paid the extra charge agreed upon for the delivery of the telegram. The instruction asked for by appellant was therefore misleading, and it was not error to refuse it. We think that the above instruction given at the request of the appellee correctly covered this phase of the case.

This is the only error which appellant, in its brief on this appeal, urges was committed in the trial of this case; and we do not think that its contention is well founded. Finding no prejudicial error, the judgment is affirmed.

WESTERN UNION TELEGRAPH COMPANY v. MCKENZIE.

Opinion delivered October 31, 1910.

TELEGRAPH COMPANY—DAMAGES FOR MENTAL ANGUISH.—The statute permitting the recovery against a telegraph company of damages for

mental anguish (Kirby's Dig., § 7947), contemplates that the mental anguish suffered should spring from real conditions, and not be merely the result of a too sensitive mind or morbid imagination.

Appeal from Lonoke Circuit Court; *Eugene Lankford*, Judge; reversed.

George H. Fearons, Trimble, Robinson & Trimble and Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. Appellee's anxiety, as shown by the proof, was without real foundation, due to her imagination, and was not that mental anguish for which the law will award compensation. Mental anguish "contemplates suffering in mind over the real ills, sorrows and griefs of life." 83 Ark. 476; *Id.* 39; 90 Ark. 268.

2. Appellant is not liable for mental anguish due to special circumstances, notice of which was not communicated to it. 79 Ark. 33; 14 Ill. App. 531.

F. T. Vaughan and Palmer Danaher, for appellee.

Appellee's anxiety, as the proof shows, was due, not to her husband's absence, but to her failure to receive an answer to her message to him. Mental suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong. 132 Am. St. Rep. 38; 85 Ark. 267-8. A recovery can be had for negligent failure to deliver a message which would have relieved mental suffering. 83 Ark. 39.

2. The nature of the message from appellee to her husband was sufficient to put appellant on notice that delay in delivering the answer would cause mental suffering. 87 Ark. 303; 85 Ark. 263; 104 Am. St. Rep. 828.

FRAUMENTHAL, J. This was an action instituted by the appellee to recover damages for mental anguish which she alleged she sustained by reason of the negligent failure of appellant to promptly transmit and deliver a telegram to her. The appellee and her husband resided in the city of Little Rock, Arkansas. On the day the telegram involved in this case was given to appellant for transmission and delivery, her husband, who was a traveling salesman, was in the State of Mississippi in the necessary prosecution of his business. On July 21, 1909, appellee gave birth to a child, and about 7 o'clock A. M. of that day she

delivered to appellant at Little Rock a telegram for transmission and delivery to her husband at McCombs, Miss., which read as follows: "Baby girl born last night. Come immediately. Answer." This message was forwarded, and was delivered to her husband at 7:45 P. M. of the same day at Brookhaven, Miss., where he was found by appellant. After reading the telegram in appellant's office, the husband immediately delivered to appellant's agent at Brookhaven, Miss., the following telegram for transmission and delivery to appellee at Little Rock: "Message just received. Starting immediately. Congratulations." The telegram was transmitted from Brookhaven, and was received at appellant's office at Little Rock about 8 o'clock P. M. of the same day; but the testimony tended to prove that appellant negligently failed to deliver the telegram to plaintiff until the following day at about 9:30 o'clock A. M. After sending said telegram, her husband at once left for Little Rock, where he arrived on the same day that the telegram was received, and at about 2 o'clock P. M. of that day. The testimony on the part of appellee tended to prove that appellee was very ill, and that she suffered mental distress during her confinement prior to the birth of the child and for some days following. She was anxious to hear from her husband, and after sending to him the above telegram she was in suspense because she did not hear from him. During the day she communicated several times with the appellant's office at Little Rock, and desired to learn whether a message had been received from him. She became apprehensive because no message had been received from him, and worried because she feared something might have happened to her husband. She testified that she became nervous and excited because she did not hear from her husband, and that this increased her fever, and that her suspense lasted until her husband arrived. She testified: "I didn't know whether something had happened to him or what was the matter. I knew he ought to have been at that place. Naturally I was very anxious." She stated that because she did not hear from her husband she suffered both mentally and physically; and the attending physician stated that the fact that she did not hear from her husband acted as a shock upon her nervous system.

Upon the trial of the case the jury returned a verdict in favor of appellee for \$750, and appellant duly prosecuted an appeal to this court from the judgment entered thereon.

We think that this case is ruled by the case of *Western Union Tel. Co. v. Oastler*, 90 Ark. 268. The facts of that case were these: A husband, who was on a business trip in the State of Texas, sent to his wife a telegram on July 24, 1908, informing her that he would be home on July 26, 1908, and through the negligence of the telegraph company the message that was delivered to her read that her husband would be home July 24. Her husband did not return to his home until July 26, and the testimony tended to prove that the wife became apprehensive for his safety because he did not come on July 24. She testified that she suffered mental distress, and was almost frantic at his continued absence. In that case this court said: "According to her own testimony, plaintiff's mental anguish was caused by imaginary situations. She imagined her husband was sick without any information to that effect." In that case it was held that the plaintiff was not entitled to recover damages on account of mental anguish.

In the case of *Western Union Tel. Co. v. Archie*, 92 Ark. 59, it is said: "In order to recover damages under the mental anguish doctrine it is necessary that the mental anguish suffered be real, and not merely the result of a too sensitive mind or morbid imagination." In that case it was also said that the plaintiff "only suffered anxiety from an imaginary situation," and that she was not entitled to recover damages for mental anguish. In the case of *Western Union Tel. Co. v. Shenep*, 83 Ark. 476, it is held that "mental suffering over suppositious or imaginary conditions is not a recoverable element."

It will thus be seen that the mental anguish for which a recovery can be had must not consist simply of annoyance or disappointment or a suffering of the mind growing out of some imaginary situation, but it must be some actual distress of mind flowing "from the real ills, sorrows and griefs of life." In the case at bar the appellee suffered mental distress, not because her husband was actually ill or in any danger, but she suffered only as a result of an unfounded apprehension. There was no real sorrow or grief that came to her through any real condition or

action of her husband. The thought of danger to her husband, or the idea that he was not sufficiently considerate of her, sprang solely from her overwrought imagination. For he was perfectly safe and affectionate, and immediately went to appellee. The failure to promptly deliver the message to her did not delay the husband's arrival one moment. The appellee did not suffer any mental distress which flowed from some actual sorrow or grief, and the delivery of the message, therefore, could not have relieved that character of mental anguish. In the case of *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, it was held that there may be recovery against a telegraph company for negligent failure to deliver a telegram which would have relieved mental anguish or suffering. But in that case the plaintiff suffered mental distress which was caused by the real condition of his brother, who was dangerously ill and was known to the plaintiff to be ill, and the receipt of the message would have relieved that distress. In the case at bar the husband of appellee was not sick, and was in no danger. The appellee could not therefore have suffered a mental distress which sprung from the real condition of her husband. Her entire mental suffering was due to "imaginary situations."

The appellee was therefore not entitled to recover damages on account of mental anguish.

The judgment is reversed, and cause dismissed.

PLANTERS' MUTUAL INSURANCE ASSOCIATION v. HARRIS.

Opinion delivered October 31, 1910.

1. ADMINISTRATION—PAYMENT OF DEBTS.—One's property at his death becomes charged with the payment of all of his debts, and a testator can not by will relieve his land or other property from liability for his debts, nor provide for the payment of one debt to the exclusion of other debts which by statute are placed in the same class. (Page 226.)
2. SAME—PAYMENT OF CLAIMS.—Without an order of the probate court directing him to do so, an administrator is not authorized to pay any claim against an estate. (Page 227.)
3. SAME—SALE OF LAND—ORDER OF COURT.—The probate court can order a sale of real estate only in the manner and for the purpose described by the statute, and should make orders for the sale of the land for the

payment of all the debts of the estate, though the application is made by or on behalf of some particular creditor. (Page 227.)

4. SAME—PAYMENT OF DEBTS—ORDER OF COURT.—An order of the probate court directing the sale of land for payment of decedent's debts, and approving such sale when made, does not authorize the administrator to pay the creditors, and a payment to them is at his peril. (Page 228.)
5. SAME—LIABILITY ON ADMINISTRATOR'S BOND.—Ordinarily, the liability of the sureties upon an administrator's bond is enforceable only in a court of law having jurisdiction thereof, but such action would not be maintainable until the probate court has adjusted the accounts of the administrator and ordered him to pay over the amount found to be in his hands. (Page 229.)
6. SAME—ADMINISTRATOR'S BOND—JURISDICTION OF PROBATE COURT.—The probate court has jurisdiction, in a summary proceeding by *scire facias*, to render judgment against the sureties upon an administrator's bond for the payment of the assets of a decedent's estate which it has found in the hands of the administrator and which it has ordered him to pay over. (Page 229.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; reversed.

R. L. Floyd, for appellant.

If an administrator makes payment or distribution under an order which is void, or which orders distribution before the debts are paid, he is not protected. 18 Cyc. 632. If a sale is not made for the payment of debts, the proceeds, if needed therefor, must be applied to the debts. *Id.* 334.

The judgment against the administrator, on which the *scire facias* was sued out, is conclusive against the bondsmen. 18 Cyc. 1190; *Id.* 1192; *Id.* 1272; *Id.* 1274; 46 Ark. 265-6.

Patterson & Green and *Mahoney & Mahoney*, for appellees.

J. C. Wright was not a distributee, but a creditor of the estate. There can be but one construction of the order of April 15, 1901—that is, that the sale was made for the sole purpose of paying his debt and another. But one meaning can be given the order of April 14, 1902, that is, it was an order directing the pay of his claim with the land or proceeds. If this order was not specific, it must be construed with the order directing the sale and the report of sale. 23 Cyc. 1101, 1102, 1104.

The order directing the application of the proceeds was a final order, and appealable. 92 Ark. 616; 74 Ark. 81. Not having been set aside in term time, nor appealed from, all

matters included therein became *res judicatae*, and the later order, that of July, 1906, was a nullity. 14 Ark. 244; 1 Ark. 497; 6 Ark. 282; 10 Ark. 241; 39 Ark. 482; 12 Ark. 95; 89 Ark. 163; 53 Ark. 316; 23 Ark. 444; 40 Ark. 393; 20 Ark. 526; 36 Ark. 401.

FRAUENTHAL, J. The appellant was a creditor of the estate of G. M. Wright, deceased, and its claim had been duly allowed by the probate court in the regular course of the administration of said estate. It obtained an order from said court adjudging that J. H. Walsh, the administrator of said estate, should pay to appellant a certain proportion of its probated claim, together with the same proportion of other claims of the same class. Having exhausted its remedy against the administrator without success of collection, it sued out of said probate court a scire facias against the sureties upon this bond as such administrator, under section 158 of Kirby's Digest, and thereby sought to obtain judgment against said sureties for the amount of its claim which had been ordered paid. The probate court refused to render judgment against said sureties, and the claimant appealed to the circuit court, and that court sustained the order of said probate court refusing to render said judgment against the sureties of said administrator. The claimant has appealed to this court.

In January, 1901, J. H. Walsh duly qualified as administrator of the estate of George M. Wright, deceased, with the will annexed, and thereafter filed a petition in the probate court asking for an order to sell the land belonging to said estate in order to pay the debts of certain named creditors of said estate in pursuance of the directions contained in the will of said testator. At its April term, 1901, the probate court made the following order of sale:

"Petition to Sell Lands Granted. On this day the court takes up the petition filed by J. H. Walsh, as administrator of the estate of George M. Wright, deceased, asking for an order to sell the northwest quarter, section 36, township 19, range 16 west, belonging to said estate under the terms of the last will of said deceased, to pay the debts provided for in said will of J. W. Anderson and J. C. Wright, and now the court, being fully advised in the premises, grants the same.

"It is therefore considered, ordered and adjudged by the

court that J. H. Walsh, administrator, be authorized and directed to sell the northwest quarter of section 36, township 19 south, range 16 west, at public sale at the east door of the court house at El Dorado, Arkansas, after giving notice of the time, terms, and place of said sale. That said sale be made on a credit of three months, the purchaser giving note with approved security, and a lien to be retained on lands for the purchase money thereof. It is further ordered that the administrator make report of said sale when made."

In pursuance of said order the administrator sold said land, and thereafter made report of such sale to the probate court. Thereupon the probate court at its April term, 1902, made an order duly approving the sale of said land. The order confirming said sale is as follows:

"In matter of estate of G. M. Wright, deceased. J. H. Walsh, administrator.

"Report of sale of real estate approved. Ordered recorded. Deed approved.

"On this day the court takes up the report of the sale of the northwest quarter, section 36, township 19 south, range 16 west, made by the administrator on the 2d day of December, 1901, after being granted an order for that purpose by the court, and the court finds that said sale was made in accordance with the law, after legal appraisalment, notice, etc., and, it further appearing to the court that deed has already been made to the said land to the purchaser thereof and has been duly acknowledged by said administrator by the clerk of this court, it is therefore considered, ordered and adjudged by the court that the sale made by the administrator in this matter be, and the same is, hereby approved and ordered recorded in volume A, sales bills, page ... It is further ordered by the court that the deed made to J. C. Wright as purchaser of said lands be approved as made and acknowledged, and that same be turned over to him."

There was no order made by the probate court directing the administrator to pay the debts of J. W. Anderson and J. C. Wright referred to in the above order of sale, unless it be considered that the said order of sale contained such direction. The administrator made no report to said court that he had made such payment to such creditors, and no order was ever

made by said court approving such payment. At a later year during the progress of said administration, the probate court ordered said administrator to file a settlement, which was done. The probate court passed upon this settlement at its July term, 1906, and restated the same. It charged the administrator with the proceeds of the sale of said land and with interest thereon, and this appears to have been all the assets of said estate which came to the hands of said administrator. It then provided for the payment of the cost of the administration, and directed that the remainder of the amount charged against the administrator be paid to all the creditors of the estate whose claims had been duly probated. This amount thus found due from the administrator was only sufficient to pay to each creditor a proportionate part of his claim, and the probate court found the specific sum that was thus payable to each creditor. It then ordered and adjudged that the administrator pay out of the funds of the estate thus charged to him to each of said named creditors the specified sum found due to each of them. The amount thus ordered to be paid to appellant was \$147.38.

In the same order it appears that the bondsmen of said J. H. Walsh, administrator, excepted to the ruling and judgment of said probate court, and asked an appeal to the circuit court, which was granted. But said appeal to the circuit court was never actually taken or perfected. The administrator failed or refused to pay to appellant the sum thus ordered paid to it by said probate court; and, after exhausting the remedy against the administrator as provided for in section 157 of Kirby's Digest, the appellant sued out of said probate court a scire facias against the sureties of said administrator, and sought by this proceeding to obtain a judgment against said sureties for the amount of its claim ordered to be paid.

It is urged by counsel for appellees that the administrator had, under the directions of the will of the decedent, applied to the probate court for an order to sell the land for the purpose of paying the debts of J. W. Anderson and J. C. Wright as provided for in the will, and that the probate court had made the above order of sale of said land in pursuance of said application. It is claimed that said above order of sale and the confirmation thereof was in effect a direction to the administrator to pay to the said creditors named in the will the amount

of their debts, which he did, and that this exhausted the proceeds of the sale of said land, which was all the assets of the estate; and it is urged that the administrator was protected by said order from further liability to said estate or the creditors thereof. The properties of a decedent become the assets of his estate, which, under our Constitution and statutes, are placed within the jurisdiction of the probate court for the due and systematic administration thereof. They become charged with the payment of all the debts of the decedent, and a testator can not by will relieve his land or other property from liability for his debts, nor can he by such will provide for the payment of one creditor to the exclusion of other creditors whose debts are by our statute placed in the same class. 18 Cyc. 335-6.

In the case of *Clark v. Shelton*, 16 Ark. 474, Mr. Justice WALKER, in delivering the opinion of this court, said in regard to the assets of a decedent's estate: "His estate became at once charged with the payment of all his debts to be paid under our statute according to class *pro rata*," and he adds that there was no reason why, as between the creditors of the estate of the same class, the whole of the assets should not be considered as one fund out of which to pay all the claims of the same class."

In the case of *Jackson v. McNabb*, 39 Ark. 111, Mr. Justice EAKIN says: "This certainly is the only proper principle with regard to the estate of deceased persons, with regard to which the Constitution and statutes have established a fixed and certain tribunal for the exhibition of all demands and within which all demands, once exhibited, amount to a prayer for payment out of all assets which are or may thereafter come into the hands of the administrator. * * * It would be repugnant to all just ideas of administration to allow creditors * * * to eliminate particular assets from the common fund and enjoy them exclusively." The statutes of this State have provided a systematic and expeditious mode for the administration of the estates of decedents. It has provided a tribunal where the claims of creditors of such estate are exhibited and passed upon, and the mode for the payment of the claims thus allowed. They provide for the classification of such claims and for the payment thereof by the administrator according to such classification.

Without an order of the probate court directing him to do so, the administrator is not authorized to pay any claim against the estate. If he does so without such due authority, he does so at his peril. *Payne v. Flournoy*, 29 Ark. 500; *Whittaker v. Wright*, 35 Ark. 511; 18 Cyc. 580.

It may be true that an administrator would be protected in making payment to a creditor of the estate in pursuance of an order of the probate court to that effect to the exclusion of other creditors (18 Cyc. 584); but we do not think that the probate court in this case made such direction in the order for the sale of the land or in the order confirming such sale. The probate court is authorized by statute to make orders for the sale of the lands of the decedent, but such order and the sale can only be made in the manner and for the purpose prescribed by the statute. *Burgauer v. Laird*, 26 Ark. 256; *Montgomery v. Johnson*, 31 Ark. 74.

In the estate now before us the court should only have made an order for the sale of the land for the payment of all the debts of the estate, although application for such order of sale was made by some particular creditor or by the administrator for some particular creditor. And we think that this is all the order of sale of the land made by the court in this proceeding accomplished or intended to accomplish. The order provides that the land should be sold on a credit, and that the purchaser should give note therefor, and that the administrator should make report thereof. It is not provided in this order that the proceeds of the sale of this land should be paid to Anderson and Wright; and it should not be presumed that the court intended to do that which under our statutes it should not have done. The administrator did not report to the court that he had made payment of the proceeds of said sale to Anderson and Wright, and the court did not approve any such payment. The order of confirmation is only an approval of the sale of the land; it does not purport to make any disposition of the proceeds for which the land sold. We do not find, therefore, that the probate court made an order directing the administrator to pay to Anderson and Wright the debts due them; and if he did so without such legal warrant, he can not thus defeat the other creditors of the estate out of a payment of the proportion of their just claims.

No question has been made by counsel for appellees relative to the jurisdiction of the probate court to render a judgment against the sureties upon an administrator's bond, but upon consideration of this question we are of opinion that in this proceeding the probate court had the power to make such an order or judgment. Ordinarily, the liability of the sureties upon the bond of an administrator, resting as it does upon a contract, is only enforceable in some court of law having jurisdiction to adjudicate the rights growing out of such contracts. An action in such court of law upon such bond would not be sustainable, however, until the probate court had adjusted the accounts of the administrator and ordered him to pay over an amount found to be in his hands, but ordinarily the circuit court would be invested with jurisdiction to entertain an action founded upon a breach of the administrator's bond. *Jones v. State*, 14 Ark. 170; *Moren v. McCoun*, 23 Ark. 93; *George v. Elms*, 46 Ark. 266; *State v. Roth*, 47 Ark. 222. But we think that the application for a scire facias against the sureties of an administrator is only a summary proceeding to secure the assets of an estate which the probate court in the exercise of its proper jurisdiction has found to be in the hands of the administrator, and that the probate court is invested with the power to proceed against the administrator and his sureties under the statute to obtain those assets of the estate. By our Constitution the probate court is given jurisdiction over the estates of deceased persons and administrators (Const., 1874, art. 7, § 34), and by the execution of the administrator's bond the sureties have subjected themselves to the jurisdiction of that court in the due administration of the assets of the estate. The proceeding is but a summary mode to obtain the assets of the estate over which, by the Constitution, the probate court is given jurisdiction. In this regard its power is similar to that which the county court has to render judgment against a delinquent collector or his sureties for the county revenues which he has collected and failed to pay over as required by law. In such a case this court has said in *Christian v. Ashley County*, 24 Ark. 143: "The Constitution confers jurisdiction upon the county court in all matters relating to county taxes. * * * The county court is the forum where the liability of the collector, upon which that of his sureties depends, is to be evidenced by its records. An adjudication in that forum is

conclusive evidence against the sureties, as well as the collector, in an action upon his bond in the circuit court. There can be no liability upon the collector's bond without such adjudication." And in that case it was held that the county court had jurisdiction to render judgment against the sureties on the collector's bond. And this decision was approved in the case of *Pettigrew v. Washington County*, 43 Ark. 33. In like manner the Constitution confers jurisdiction upon the probate court in all matters relating to the estates of deceased persons and administrators. An adjudication of the amount due by the administrator in his settlement of the assets of the estate by the probate court and the order of that court to pay such amount is conclusive, and no action on the bond of the administrator can be maintained until such order to pay over has been made by the probate court. Basing our determination upon the above decisions that the county court has jurisdiction to render judgment against the sureties of a collector for the payment of the county revenues, we are of the opinion that the probate court has the power by way of this summary proceeding to render judgment against the sureties upon an administrator's bond for the payment of the assets of a decedent's estate which it has found in the hands of the administrator, and which it has ordered him to pay over. 18 Cyc. 1279.

The judgment is accordingly reversed, and the cause remanded for a new trial.

CHEATHAM v. J. W. BECK COMPANY.

Opinion delivered October 24, 1910.

1. REFORMATION—SUFFICIENCY OF EVIDENCE.—To justify the equitable remedy of reformation, the proof must be clear, unequivocal and decisive. (Page 233.)
2. LANDLORD AND TENANT—SEVERANCE OF RENT FROM REVERSION.—Where a landlord took rent notes for his land, and pledged such notes to a creditor, and subsequently leased the land to another, he will be held to have severed the rent from the reversion, so that the right to collect the rent notes did not pass to the second lessee. (Page 234.)
3. SAME—BREACH OF LEASE—DAMAGES.—Where a landlord leased to A land which he had previously leased to B, A will be entitled

to recover the rental value of the land during the time he was deprived thereof by reason of B's possession under the prior lease. (Page 236.)

Appeal from St. Francis Chancery Court; *Edward D. Robertson*, Chancellor; reversed.

STATEMENT BY THE COURT.

A. W. Cheatham filed his complaint in the St. Francis Chancery Court, alleging his lawful possession of a certain portion of the Linden farm known as the Posey field, under a lease from W. R. Taylor and Rena Taylor to E. W. Arterberry, and prayed an order enjoining the appellee, the J. W. Beck Company, from interfering with his right to peaceably occupy and cultivate said field until dispossessed in manner and form as the law directs, etc.

The J. W. Beck Company answered, also making its answer a cross bill against A. W. Cheatham, R. L. Pettus, W. R. Taylor and Rena Taylor, claiming right to possession of the same premises under a lease from the Taylors dated August 4, 1906, which described the land as follows:

"A tract of land known as the Linden farm is intended to and does include all the lands in cultivation, as well those lands that are now leased to parties to be cleared as those that are now cleared, and especially the lands leased to Joe Meyers and E. W. Arterberry, and also all lands that are suitable to be cleared and put in cultivation."

The answer denied the allegations of the complaint. The cross complaint alleged that Cheatham and Pettus had refused to pay to appellee the annual rent, which had been demanded.

The prayer of the cross bill is for judgment against A. W. Cheatham and R. L. Pettus for two years' use and occupation of the Posey field and Hughes residence, and also for possession of said premises, or, in the event that the lease from the Taylors to Arterberry be held valid, then that the Taylors be required to bring into court the outstanding rent notes executed by it and submit to a credit of \$435 for each of five years, etc.

To the cross bill A. W. Cheatham and R. L. Pettus filed their separate answer, denying the claim of the J. W. Beck Company, and claiming the right to use and occupy said premises under a lease from the Taylors to E. W. Arterberry, dated September 2, 1905, and afterwards transferred by Arterberry

to R. L. Pettus. Also claiming that Taylor on September 2, 1905, delivered to Pettus the notes given by Arterberry for annual rent of the land, with directions to collect the notes as they should fall due and credit the proceeds on Taylor's indebtedness to Pettus.

W. R. Taylor and Rena Taylor filed their separate answer to the cross bill, admitting execution of the lease contract to the J. W. Beck Company and setting up the defense that, as both the Arterberry and Myers leases would expire during the life of the lease to Beck Company, "it was expressly agreed between the parties to the lease that the Beck Company should be entitled to the possession and use of the Posey field, the E. C. Hughes residence, the Arterberry lease and the Joe Myers lease, after the expiration of the several leases under which said lands were held," and prayed that the contract be reformed and corrected to conform to the real intention of the parties.

The court adjudged "that the lease contract should not be reformed, and that the defendant, the J. W. Beck Company, is entitled to recover on its cross bill; and that the J. W. Beck Company is entitled to the rent from the Posey field during the life of the Arterberry lease which will expire with the year 1910, and that R. L. Pettus is entitled to the use of the same at a rental of \$225 per annum;" that "for the year 1910 the J. W. Beck Company is entitled to the use and possession of the E. C. Hughes residence." Judgment was entered against R. L. Pettus for the possession of the E. C. Hughes residence, also, for \$225 per year, or three years, \$675 for use of Posey field, with interest \$47.64, and aggregating \$722.64.

An appeal was granted to all defendants to the cross bill,

Walter Gorman, for appellants.

1. Appellee, not having made actual entry into possession either of the Posey field or Hughes residence under their lease from the Taylors, should not maintain this action for use and occupation, or for possession. 18 Am. & Eng. Enc. of L. (2 ed.), 211, 453; 33 N. J. L. 55; 10 N. Y. 479; 91 N. W. 793.

2. When Taylor delivered to Pettus the Arterberry rent notes with directions to collect same and apply the proceeds to the credit of Pettus' debt against the Taylors, the notes became a pledge or collateral security for so much of their debt to

Pettus, conferring upon him a special property in the notes, a right to their possession and a lien upon the proceeds which was paramount to the rights of other creditors, purchasers or assignees of the Taylors. 38 Ark. 285; 49 S. W. 541.

Norton & Hughes, for appellee.

Where a landlord leases land and afterwards conveys it without reservation, his right to the rent passes to the purchaser, and the tenant must attorn to him. 10 Ark. 9. Likewise, if he leases to one party for a term, and afterwards, while this lease is unexpired, makes a second, or "over-lease," to another party for a longer term, the second lessee is considered as a grantee of the reversion, and is entitled to the rents agreed to be paid by the first lessee. 18 Am. & Eng. Enc. of L., 283; 1 Tiffany, Landlord and Tenant, 872.

The landlord may dispose of accruing rents to one person and of the reversion to another who may be either a grantee or second lessee. 1 Tiffany, Landlord and Tenant, 1105, *et seq.*

Walter Gorman, for appellants in reply.

To render an over-lease effective as a grant of the reversion, there must be an attornment by the first lessee to the second lessee, otherwise the latter acquires only an *interesse termini*. L. R. 1 Eq., 403; 4 Coke, 52. It appears by the testimony that the rent was severed from the reversion long before the date of appellee's lease. 76 Ala. 298; 90 N. C. 245; 71 Ill. App. 309; 1 Tiffany, Landlord and Tenant, 1107, and authorities cited; 133 Mich. 617; 34 Mich. 292; 113 Mich. 449.

WOOD, J., (after stating the facts). 1. The lease shows, in language unmistakable, that the parties to it intended to include the lands leased to E. W. Arterberry. For the language is: "And especially the lands leased to Joe Myers and to E. W. Arterberry." It is uncontroverted that the lands leased to E. W. Arterberry constituted what is designated as the Posey field and the Hughes residence, the same being portions of the Linden farm. To justify the equitable remedy of reformation, the proof must be "clear, unequivocal and decisive." *McGuigan v. Gaines*, 71 Ark. 614; *Goerke v. Rodgers*, 75 Ark. 72; *Davenport v. Hudspeth*, 81 Ark. 166. See also *McCracken v. McBee*, *post* p. 251. It is not so here.

The evidence as to the intention of the parties, aside from

the written memorial, is very conflicting. The witnesses who negotiated the lease on the part of appellee are positive in their testimony that the lands in the Arterberry lease were to be included in the lease under consideration as that lease recites, and that the lease as to these lands began from the date of the lease. The testimony of W. R. Taylor, who made the lease for the Taylors, is equally as positive that the parties did not intend that the lease should begin as to the lands in the Arterberry lease until that lease had expired.

Stress in argument of counsel for appellants is laid upon the fact that the witness representing appellee in making the lease stated that the company did not take possession of the land held by Myers included in the present lease until the expiration of his prior lease. Counsel argue that, as the Myers lease and the Arterberry lease were governed by precisely the same clause in the lease under consideration, the fact that appellee did not take possession or claim compensation for the lands leased by Myers until his lease expired showed that the intention of the parties was not to have compensation for or to take possession of the lands in the Arterberry lease until the expiration of such lease. But the argument has no force, for the reason that Myers was to have the use of the land leased by him without any rent charge. He was to use, free of rent, the land that he cleared, whereas the lands were leased by Arterberry at an annual rental of \$225. It was worth while for appellee to claim the Arterberry lease; not so the lease to Myers. Arterberry was to pay rent; Myers was not. The Taylors contend that the lease should be reformed so as to read as follows: "Especially the lands leased to Joe Myers and to E. W. Arterberry, from and after the expiration of the two leases under which said lands are now held." The court did not err in refusing to reform the lease.

2. We are of the opinion that a preponderance of the evidence shows that before the lease under consideration was executed the Taylors, lessors, had severed the rent of the lands in the Arterberry lease from the reversion. W. R. Taylor delivered the notes executed by Arterberry for the rent of the land occupied by him to R. L. Pettus, and directed him to collect the notes and to give the Taylors credit for the amount on their account. This transfer was made on the 2d of September.

1905, the day the notes were executed. The Taylors at the time were indebted to Pettus in an amount greatly in excess of the Arterberry notes. The deposit of these notes with Pettus to be held by him as collateral security for his debt against the Taylors constituted him in equity the legal owner and holder thereof for the purpose indicated. Therefore Pettus was entitled to the amount of these rent notes.

Witnesses on behalf of appellee testified that when W. R. Taylor was showing them the Linden farm with the view of leasing same to appellee, he said that appellee would get the Arterberry rent. Taylor at that time did not refer to the rent notes, but when he executed the lease to appellee, August 4, 1906, he said that the rent notes given by Arterberry were at R. L. Pettus's, and that he would get them and turn them over to appellee. W. R. Taylor, on behalf of appellants, testified that when the Posey field or Arterberry lease was mentioned he told the agents of appellee that Arterberry had a lease on the Posey field, and that R. L. Pettus had the notes to collect. He testified "that he at no time promised to get the Arterberry notes from Pettus and deliver them to the appellee." He says: "I made no such statement, and could not have done so, because I had in good faith turned over the Arterberry notes to Pettus for collection and credit on my account, and it was out of my power." Pettus testified that the notes were left with him by W. R. Taylor with directions to collect and apply on account, and that he credited the four years' rent, \$900, as directed by Taylor. It was in evidence that the appellee paid the annual rental of \$2,700 for the three years, 1907, 1908 and 1909, by crediting the account of Taylor with the entire amount of the rent for those years, and had not demanded from Taylor the Arterberry notes, and had not charged back or demanded any deduction from their annual rental of \$2,700 on account of the Arterberry rent which it did not get. While the evidence is conflicting, in our opinion the decided preponderance is in favor of the finding that the Taylors had severed the rent from the reversion, before the lease under consideration was executed, by transferring the notes given by Arterberry for the rent of the Posey field and Hughes place to appellant Pettus. "A severance of the rent from the reversion takes place, not only when the landlord transfers the reversion without the rent, but also when he

transfers the rent without the reversion." 1 Tiffany's Landlord and Tenant, page 1107, and authorities cited in note.

It follows that the court erred in rendering judgment against Pettus for the rents in controversy. As between Pettus and appellee, the rents belong to Pettus. The court also erred in rendering judgment for possession of the Hughes residence for the year 1910. The Arterberry lease did not expire until the end of the year 1910, and Pettus held under that lease.

3. The Taylors included in their lease to appellee lands that had been previously rented to Arterberry. These lands were a part of the consideration of the lease between the Taylors and appellee. The appellee failed to get what its contract called for, and this was through no fault of appellee, but was the fault of the Taylors. The fact that appellee paid the full amount of the rents according to its contract for the years, 1907, 1908 and 1909, without abatement on account of a failure to get the Arterberry lands, was no waiver of their right to those lands or their rental value. The fact that appellee pursued a wrong remedy in an attempt to collect rents was no waiver of its right against the Taylors. The rental value of the lands which the Taylors rented to appellee, and which it did not get, was shown to be \$225 per annum. That was a part of the consideration of the lease contract between the Taylors and appellee, and the Taylors had placed it beyond the power of appellee, as we have seen, to occupy the land or to collect the rents therefrom for the years, 1907-1910. To that extent the Taylors have failed to comply with their contract with appellee, and the latter is justly entitled to a decree against them for the rental value of the lands in the Arterberry lease for those years. Since the Taylors are not entitled to a reformation of the lease contract, it logically follows that appellee is entitled to judgment against them for the rental value of the land which they leased to it, but which it did not get.

The judgment will therefore be reversed with directions to dismiss the cross complaint as to Pettus, and to enter judgment in favor of appellee against the appellants, the Taylors, in the sum of \$900.

SHELTON v. STATE.

Opinion delivered October 24, 1910.

1. FALSE PRETENSE—FRAUDULENT CONVEYANCE DISTINGUISHED.—The offense of procuring personal property by false pretense, as defined by Kirby's Digest, § 1689, is distinguished from the offense of defrauding creditors or purchasers, as defined by section 1693, is that the former offense is obtaining money or property by false representations of an existing or past fact, whether relating to land or anything else, by one who knows the representation to be false, while the latter offense may exist under a conveyance to defraud, whether there be false representations or not. (Page 241.)
2. SAME—INDICTMENT—SURPLUSAGE.—Where an indictment for false pretense alleged that defendant procured a check of value mentioned *and also the satisfaction of an account due by the defendant*, the latter allegation is mere surplusage. (Page 242.)

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellant was convicted of the crime of false pretenses. The indictment charged that appellant in Lafayette County, Arkansas, on the 10th day of April, 1909, did unlawfully, feloniously, designedly and with intent then and there to cheat and defraud S. D. McGill & Company, a firm composed of S. D. McGill and Ed Alexander, falsely represent and pretend to said S. D. McGill and said S. D. McGill & Company that he was the owner of three acres of land situated in Fordyce, Arkansas; that said land was not incumbered; that he did not owe 'one cent' on the land; and that there was not a scratch of the pen against said land; whereas in truth and in fact said three acres of land in Fordyce was incumbered; whereas he did owe one J. C. Bleier the sum of \$400 for the purchase money of said land, and said amount was a lien against said land, all of which the said defendant then and there well knew; that said defendant then and there well knew each of said pretenses were false; by means and color of which said false pretenses he, the said R. P. Shelton, induced the said S. D. McGill & Company to purchase said land for the sum of \$300; and by means of same did then and there sell said land to said S. D. McGill & Company for said sum of \$300, the deed being made to Ed Alexander,

a member of said firm as aforesaid; and by means and color of which said false pretense he, the said R. P. Shelton, then and there unlawfully, feloniously and designedly, with intent then and there to cheat and defraud said S. D. McGill & Company, obtained from said S. D. McGill & Company a bank check on First National Bank of Lewisville, Arkansas, for the sum of \$123.50, payable to said R. P. Shelton, of the value of \$123.50, the property of said S. D. McGill & Company, and the satisfaction of an account due the said S. D. McGill & Company for the balance of the value of \$176.50, against the peace and dignity of the State of Arkansas."

The appellants demurred, and for grounds alleged that the indictment was not sufficient to constitute the charge of obtaining money or property from S. D. McGill & Company, and specifically:

1. That the indictment charges deed to have been made to Ed Alexander.

2. That the land was conveyed by deed, which takes it out of the class of crimes for which defendant can be held for false pretense.

3. Because it charges the satisfaction of an account, which is not an indictable offense for false pretense.

The evidence on behalf of the State tended to prove that appellant in April, 1909, in the town of Lewisville, Lafayette County, Arkansas, represented to S. D. McGill that he was the owner of a certain tract or parcel of land in Fordyce, Arkansas, that he had paid for it, and that there was not a cent against it. Relying upon his representations that he did not owe anything on the land, the firm of S. D. McGill & Company bought same of him, taking the deed in the name of Ed Alexander. The firm was composed of S. D. McGill and Ed Alexander. The firm gave appellant the account he owed it, and in addition a check for the sum of \$123.50 as a consideration for the land. Appellant received the money on the check. It was afterwards ascertained that appellant did owe something for the land. He had bought the land from J. G. Bleier. The deed to appellant from Bleier recites a consideration of \$400, \$100 due January 1, 1909; \$200 due March 1, 1909, and \$100 due April 1, 1909. One of these for \$100 was due January 1, and S. D. McGill testified that, if he had known that appellant

owed the notes given to Bleier as a part consideration for the land, he would not have purchased the land. The notes were sent to Lewisville for collection. McGill and Alexander talked to appellant about it after they ascertained that appellant had executed notes for the land. Appellant insisted that his deed to Alexander was all right, but admitted that the notes had not been paid. He said, although he had not paid for the land, he would deed it to witness, and he (witness) could get rid of it to an innocent purchaser.

Another witness heard appellant tell McGill, when he was trying to buy the land from appellant, "that there was not the scratch of the pen against it."

The deed from Bleier to appellant named a consideration of \$400 and recited that \$100 was due January 1, 1909; \$200 due March 1, 1909; \$100 due April 1, 1909.

The deed made to Alexander was intended for the firm of S. D. McGill & Company. It was put in Alexander's name for convenience.

Witness Alexander, on behalf of appellant, testified that he did not think he was a partner in the firm of S. D. McGill & Company; said he invested two thousand dollars in the business of this firm for his daughter, and, while he did not get anything out of it, he was responsible for the debts, and, if anything had been lost, he would have lost it. He did not know whether he was a partner or not. He did not consider that he was. The firm was composed of S. D. McGill and Ed Alexander.

The court instructed the jury as follows: "That the obtaining of the satisfaction of a debt by a false pretense would not sustain the charge in the indictment. But if the evidence showed beyond a reasonable doubt that the defendant, for the purpose of cheating and defrauding the said S. D. McGill & Company, a firm composed of S. D. McGill and Ed Alexander, as aforesaid, out of their money—out of this check for \$123.50—falsely represented to them that he owned three acres of land in Fordyce, Arkansas, that the title was clear and unincumbered, that he owed nothing on it, and if by that means he obtained from S. D. McGill & Company a check of the value of \$123.50, as alleged in the indictment, and it occurred in this county within three years before the finding of this indictment, then you may

find him guilty. If you entertain a reasonable doubt as to whether he made these pretenses to S. D. McGill & Company, or as to whether or not he obtained the check under these pretenses, or if you entertain a reasonable doubt as to whether or not he owned that land, and these pretenses were false, you will give him the benefit of the doubt and acquit him.

"The court will further tell you that the indictment charged that S. D. McGill & Company was a firm composed of two members—S. D. McGill and Ed Alexander. It devolves on the State to show that that firm consisted of two members; and if you should find from the evidence, or if you should not believe from the evidence that Ed Alexander was a member of that firm at the time, then there is a variance between the allegation of the indictment and the proof, which will entitle the defendant to an acquittal." And further:

"The defendant represented himself as the owner of this land in fee simple; that there were no incumbrances against it; not a scratch of a pen against it, as some of the witnesses testify; if that is true, he is not guilty of anything, or, if the State has failed to show that that is not true, he is not guilty of anything.

"There was another allegation in the indictment charged against the defendant—that he represented to these parties that he did not owe one cent on the land at Fordyce, Arkansas. If you find that the State has shown that is false, from the evidence in this case, and that, by means of that and other false pretense charged, he obtained the check, why, he would still be guilty. The State don't have to prove that he made all of these false pretenses; but if it has shown that he made one of them, and has shown it beyond a reasonable doubt, and got the money by virtue of which, he is guilty, as charged in the indictment."

The appellant requested the following instructions:

"1. To make out a complete case of false pretense, the following essential facts must be established by the evidence, beyond a reasonable doubt: (1) the intent to defraud some particular person or persons; (2) an actual fraud committed; (3) the false pretense; (4) that the fraud resulted from the employment of the false pretense. If you find that the four

essential facts have not been established, you must find for the defendant.

"2. An indictment for obtaining money under false pretenses must describe the money with the same particularity and certainty as an indictment for larceny; and unless you find from the evidence that it is so described, you must find for the defendant.

"3. You are further told that you can not convict the defendant on proof that he by false pretenses obtained the satisfaction of his debt to S. D. McGill & Company, which, though sufficient to sustain an action by said S. D. McGill & Company against said defendant for money, is not sufficient to sustain an indictment for false pretense; therefore, in this case, if you so find, your verdict must be for the defendant.

"4. If the proof shows that in this land transaction the defendant, by false pretense, obtained money, and the satisfaction of his indebtedness greatly exceeded the amount of money in value, you will acquit the defendant."

The court refused the above prayers, and appellant duly saved his exceptions.

D. L. King, for appellant.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

WOOD, J., (after stating the facts). Appellant was convicted of obtaining property under section 1689 of Kirby's Digest, which makes it a felony to obtain by "any false pretense" "any personal property," etc., of another. Appellant contends that, inasmuch as the alleged false pretense was concerning land which he conveyed, he could have only been indicted under section 1693 of Kirby's Digest. That section reads: "Every person who shall be a party to any conveyance or assignment of any real estate, or interest in any real estate," etc., "with intent to defraud any prior or subsequent purchaser, or to hinder, delay or defraud creditors or other persons, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than five hundred dollars."

The above sections prescribe different offenses. The gravamen of section 1689 is the obtaining of money or property by any false representation of an existing or past fact by one who

knows the representation to be false at the time he makes it. The false representation may be concerning land or anything else, but there must be a false and fraudulent representation. Under section 1693 the offense may be committed by a conveyance of land to defraud whether there be any false and fraudulent representation of a present or past fact made to the person defrauded or not.

Proof necessary to convict of the crime charged under section 1689 would be essentially different from that required to convict under section 1693. See *State v. Asher*, 50 Ark. 427.

The allegation as to the satisfaction of an account due S. D. McGill & Company was merely surplusage, and the court eliminated this from the consideration of the jury.

The check which appellant is alleged to have obtained by his false pretense is described with sufficient particularity to identify it as the check of S. D. McGill & Company. It was shown to have a value of \$123.50. There was no variance between the allegations and the proof as to the ownership of the money that was paid on the check. It was the money of S. D. McGill & Company. The proof conformed to the allegations. As to whether or not S. D. McGill & Company was a partnership composed of S. D. McGill and Ed Alexander was submitted to the jury. There was evidence to warrant a finding that there was such a partnership.

The appellant contends that the court erred in not instructing the jury that before appellant could be convicted it was necessary for the State to show that there was a lien or incumbrance on the land. This contention can not be sustained. The alleged false pretense was that the land was "not incumbered, that he did not owe one cent on the land, and that there was not the scratch of the pen against said land." The court in its instruction did submit to the jury the question as to whether the appellant made the representations alleged in the indictment, and as to whether these representations, if made, were false, and whether appellant obtained by reason of such representations a check of S. D. McGill & Company of the value of \$123.50. The instruction of the court was in strict conformity with the allegations and the proof. The court did not err in its instruction. The evidence was amply sufficient to show that appellant made the representations alleged in the

indictment, and that at the time he made such representations there were notes outstanding which he had given for the purchase price of the land. The deed recited that the consideration was in deferred payments, and the evidence shows that notes were given for the deferred payments. It was in evidence that these notes were unpaid, and that S. D. McGill & Company would not have accepted the deed from appellant, had they known that appellant had not paid for the land. This testimony was sufficient to show the representations, their falsity, that appellant knew them to be false, and that he obtained the check for \$123.50, and of that value, by reason of such representations.

We find no error in the rulings of the court. The judgment is correct. Affirm.

FORT SMITH & WESTERN RAILWAY COMPANY v. MESSEK.

Opinion delivered October 24, 1910.

1. **INSTRUCTIONS—OBJECTION TO FORM—OBJECTION.**—An objection to the form, but not the substance, of an instruction must be specifically made. (Page 248.)
2. **RAILROADS—CROSSING ACCIDENT—NEGLIGENCE.**—Evidence that a traveler was struck at a railroad crossing at night by an engine propelled without headlight or signal is sufficient to establish negligence on part of the railroad company. (Page 246.)
3. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—In determining whether the question of contributory negligence should be submitted to the jury, the evidence should be considered in the light most favorable to plaintiff. (Page 246.)
4. **RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.**—Plaintiff, before starting across defendant's track at a crossing at night, stopped his horses and looked up and down the track and listened, but saw and heard no train approaching. He was struck by an engine which approached without headlight or noise. *Held* that he was not guilty of contributory negligence as matter of law. (Page 246.)
5. **RAILROADS—DUTY TO KEEP LOOKOUT.**—Kirby's Digest, § 6607, requiring all persons running trains upon any railroad to keep a constant lookout for persons and property upon the track, imposes this duty upon persons running a locomotive engine in a railroad yard. (Page 248.)
6. **EVIDENCE—NEGATIVE TESTIMONY.**—Where a witness was so situated that he could have heard the bell of a locomotive engine if it had been rung, he may testify as to whether it was rung or not. (Page 250.)

Appeal from Sebastian Circuit Court, Fort Smith District;
Daniel Hon, Judge; affirmed.

C. E. & H. P. Warner, for appellant.

By the allegations of his complaint and his own testimony appellee has shown that the injury resulted from his own negligence. 61 Ark. 556; 65 Ark. 236; 69 Ark. 139; 49 Ark. 458; 64 Ark. 363; *Id.* 360; 61 Ark. 620; 79 Ark. 228; 80 Ark. 188; 91 Ark. 18; 94 Ark. 524; 95 Ark. 190; 127 S. W. (Ark.) 715; 65 Ark. 239; 84 Ark. 275; 125 N. Y. 407; 103 Ind. 312; 9 Fed. 867; 95 U. S. 542; 60 N. W. 57; 128 Ind. 138; 105 Mass. 77; 24 Atl. 747; 42 N. W. 24; 75 N. Y. 273; 25 Mich. 274.

Jo Johnson, for appellee.

HART, J. John Messek brought this action against the Fort Smith & Western Railway Company to recover damages for personal injuries sustained by himself, alleged to have been caused by reason of having been struck by one of defendant's engines on a public crossing in the city of Fort Smith. The defendant answered, denying negligence on its part and pleading contributory negligence on the part of the plaintiff. There was a jury trial, resulting in a verdict and judgment for plaintiff, from which this appeal is prosecuted.

The first assignment of error (and to our minds the most serious question in the case) presents the question of whether the evidence supports the verdict.

The plaintiff was a native of Poland, and spoke the English language imperfectly. He was a witness in his own behalf, and was examined through an interpreter. He said that he was a coal miner, and lived at Denning, Arkansas. That in September, 1909, he was in the city of Fort Smith, Arkansas, visiting a friend of his named John Boterus. That on the day he was injured he started with Boterus to deliver some goods to a customer of the latter. They went in a spring wagon owned by Boterus, and drawn by one horse. It was necessary to cross the track of the defendant company at D Street. This was a public crossing, and the defendant company had seven tracks there. They reached the crossing sometime after 7 o'clock in the evening. In the language of the plaintiff, "it

was just sun down, dusk ; it was not dark, and it was not bright daylight." There were seven railroad tracks at the crossing, and the plaintiff and Boterus were going west. When in about ten feet of the first track, they stopped, and plaintiff said to Boterus: "Do you think it is all right to go across these tracks? Is there anything that can strike us?" Boterus replied, "No, everything is still, and we will cross." They saw an engine standing still above them, but everything was quiet. As they got on the last track, an engine struck their wagon. Plaintiff says that he knows that engines give signals by ringing the bell and sounding the whistle as they approach a public road crossing. He says that he listened as they crossed the tracks, but that he heard no ringing of the bell, sounding the whistle, or movement of the engine; that the first he knew of the approach of the engine it struck the wagon in which he was riding. He said that there was no headlight on the engine, and that the wagon was at about the center of the crossing on the last track when it was struck. There is no contention that the verdict was excessive. Hence it is not necessary to abstract the testimony as to the character and extent of the plaintiff's injuries.

The witnesses for the defendant say that the accident occurred "just about dusk between 7 and 8 o'clock." The engine had been on the cinder pit, where its fires were emptied. The headlight on the engine was not lighted; but there was a lamp set on the tank just back of the cab. The engine was making steam. The hostler and his assistant started to move the engine from the cinder pit to a storage track, and in so doing it was necessary to cross the public road where plaintiff was injured. The hostler walked ahead of the engine to throw a switch and was carrying a lamp. He had walked across the public crossing, and was throwing the switch when the wagon was struck. He did not see the wagon until after it was struck by the engine. His assistant was on the engine, and says he was keeping a lookout, but did not see the wagon until just as the engine struck it. Said he was on the right hand side of the engine, and the plaintiff came from the left hand side. That if he had been on the left hand side he would probably have seen them. Said that when he got upon the engine at

the cinder pit he rang the bell; that the front of the engine was about fifteen feet from the street when he started through.

There is sufficient evidence to establish negligence on the part of the defendant. According to the testimony of the plaintiff, the servants of the defendant neither rang the bell nor sounded the whistle as they approached the crossing. The statute requires these signals to be given for the purpose of warning persons of the approach of the train in order that they may not get in its way.

In determining whether the question of contributory negligence of the plaintiff should have been submitted to the jury, the evidence must be considered in its most favorable light to the plaintiff. The facts in this case are very similar to those in the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Johnson*, 74 Ark. 372, where a verdict for the plaintiff was sustained.

The evidence shows that the plaintiff and his companion before starting across stopped their horse and looked up and down the tracks. They neither saw nor heard any trains approaching. They did see an engine on one of the tracks, but, on account of it not having any headlight, they might have inferred that it was stored on the track for the night. They then proceeded across the tracks, and while the plaintiff does not directly state that he continued to look, his testimony unmistakably shows that his senses were on the alert during the whole time he was on the railroad crossing. He says positively that it was dusk, that everything was quiet, and that he listened for signals or warnings of the approach of trains and heard none. The jury had a right to take into consideration all the surrounding circumstances, such as the situation of the plaintiff, his degree of attention and his alertness. The defendant's witnesses, although they were on the lookout for persons and teams as the engine approached the crossing, did not see the wagon in which the plaintiff and his companion were riding. It was dusk, that is, approaching darkness. The headlight of the engine was not lighted. It was running very slowly, and, if the plaintiff's testimony is to be believed, noiselessly. It is not surprising that under these circumstances the plaintiff did not see it approaching. When the jury gave to the testimony of plaintiff its full probative value

in the light of all the attendant circumstances, they were justified in finding that he used all his senses while on the railroad crossing, and we hold that the evidence warranted the verdict.

Among other instructions, the court gave the following at the instance of the plaintiff:

"1. If you find from a preponderance of the testimony, that plaintiffs, Messek and Boterus, were driving along a public thoroughfare or street in the city of Fort Smith, which street was crossed by defendant company's railroad track, and that, on approaching said track, plaintiffs stopped, looked and listened, and saw no moving train or engine, and heard no bell ringing or whistle sounding, and saw or heard nothing else to put them on notice of danger, then it was not negligence for them to proceed to cross said track, unless you find that the engine was partly across the street, and that plaintiff failed to make proper investigation or inquiry as to whether it was proceeding to cross at the time."

At the request of the defendant, the court also gave the following instruction:

"2. You are instructed that plaintiff, in approaching the point where the road on which he was traveling was crossed by a number of railroad tracks of the defendant, some of which entered the round house and repair shop, the plaintiff, before crossing any of said tracks, was required to look and listen for approaching trains, cars and engines; and if you find that by looking and listening the injuries alleged to have been sustained by him could have been avoided, then you will find for the defendant."

The following instruction asked by the defendant was refused by the court:

"4. You are instructed that the plaintiff was required to look and listen for approaching trains upon every track he crossed, and when, by the exercise of care in this respect, the danger could have been avoided, a failure to look and listen will constitute such negligence that, if he was injured, no recovery can be had against the defendant."

Counsel for the defendant urged that the court erred in giving instruction No. 1. because it assumed that there was only one track at the crossing. The instruction is not susceptible

of that construction when considered in connection with instruction No. 2.

Again counsel for defendant insists that the court erred in refusing instruction No. 4. We do not agree with them. While the plaintiff owed the continuing duty of looking and listening as he crossed each track, his duty in that regard was explained in instruction No. 2. This instruction told the jury that the plaintiff, "before crossing any of the tracks, was required to look and listen for approaching trains." When considered in connection with each other, it is manifest that both court and the jury understood from reading instructions Nos. 1 and 2, that the plaintiff must look and listen while crossing each track of the railroad. If the defendant thought otherwise, it was its duty to make a specific objection, and thus point out the different shades of meaning of which the instructions were susceptible. This was not done, and it is the settled rule of the court that an objection to the form, and not to the substance, of an instruction must be specifically made.

Again, it is objected by counsel for the defendant that the instruction on the measure of damages was not correct, and that the judgment should be reversed because it was given. The instruction complained of is not in very good form, but it contains all the elements of damages that are recoverable in cases of this sort, in accordance with the rule announced in the following cases: *Railway Company v. Sweet*, 60 Ark. 550; *Arkansas Southwestern Ry. Co. v. Wingfield*, 94 Ark. 75; *St. Louis, I. M. & S. Ry. Co. v. Hartung*, 95 Ark. 220.

An examination of the record discloses no reversible errors, and the judgment will be affirmed.

ON REHEARING.

Opinion delivered November 14, 1910.

HART, J. In their motion for a rehearing counsel for appellant complain that we did not discuss two of their assignments of errors, one in regard to the court giving over their objection instruction No. 2, and the other in refusing instruction No. 5 asked by them.

The one given is as follows:

"2. If you find from a preponderance of the testimony that the defendant company, through any of its servants or

employees, ran an engine along said track in the night time without keeping a lookout for persons and property on the track, or without ringing a bell or sounding a whistle, or without a headlight on the engine, at the time and place when and where plaintiffs were about to cross said track, this would be negligence, and you will so find."

The one refused is as follows:

"5. You are instructed that if you find from the evidence that the engine which collided with the plaintiff herein was being brought from the cinder pit for the purpose of placing same upon a side track, and was not in regular use by defendant, but was being prepared for use, then it is immaterial whether or not the engine was equipped with a headlight. And you are further instructed that if the plaintiff saw the engine before the accident occurred, then it is immaterial whether or not the engine was equipped with a headlight."

It is true, we did not specifically discuss the action of the court in giving or refusing the instructions in question; but we duly considered them, and thought the principles decided in the case of *St. Louis, I. M. & S. Ry. Co. v. Johnson*, 74 Ark. 372, cited in our original opinion, would indicate that we had considered them. To be more specific, it was decided in the case of *Little Rock & Fort Smith Ry. Co. v. Blewitt*, 65 Ark. 235, that "an engine and tender are a train, within the meaning of the statute making railroads responsible for all damages to persons and property done or caused by the running of trains in this State."

"Kirby's Digest, sec. 6607, providing that it is the duty of all persons running trains upon any railroad to keep a constant lookout for persons and property upon the tracks, etc., requires a lookout to be kept by persons running cars and engines in a railroad yard." *Little Rock & Hot Springs Western Railroad Company v. McQueeney*, 78 Ark. 22.

In the *Johnson* case the evidence for the plaintiff tended to show that the train which injured him was a work train, consisting of an engine, tender and two water cars, which was being slowly backed over the crossing at night without lights or signals. The court said: "There was abundant evidence of the negligent operation of the train to submit that

question to the jury; and, as it was done under proper instructions, it must be taken here that the company negligently failed to keep a lookout and give warning of its movements." In such cases the question is whether the train is being negligently operated, and in determining that question the purpose for which the train is being operated does not enter.

Again, it is contended by counsel for appellant that the evidence of appellee tending to show that the train approached the crossing without giving warning by ringing the bell or sounding the whistle was negative. We do not agree with their contention. All the facts and circumstances attending the occurrence as testified to by appellee tend to show that he was using his senses continually while on the crossing. He knew that it was the duty of the servants operating the train to give notice of its approach to a public crossing by ringing the bell or sounding the whistle. During the whole time he was on the crossing he was noticing for these signals. The conditions and circumstances surrounding him were such that he could have heard the signals, had they been given. Everything around there was quiet. His mental condition was such that he could have heard the bell, had it been rung. In such case he must be said to have such knowledge as enabled him to speak affirmatively of the existence of the fact in regard to which he testified. See Wigmore on Evidence, § 664. As stated by Prof. Wigmore, "the only requirement is that the witness should have been so situated that, in the ordinary course of events, he would have heard or seen the fact had it occurred;" and under such a condition the testimony is not "based on what may be called negative knowledge."

As stated in our former opinion, while the evidence on the part of appellee was weak, we think it was sufficient to warrant the verdict of the jury. The motion for rehearing will be denied.

McCRACKEN v. McBEE.

Opinion delivered October 17, 1910.

1. **CANCELLATION OF INSTRUMENTS—JURISDICTION.**—The right to a cancellation of instruments is exclusively equitable, is often granted as ancillary and preliminary to the final relief by which a party's primary right, estate or interest is established or enforced, and is exercised to remove an obstacle which stands in the way of one's right, interest or estate. (Page 263.)
2. **SAME—INSTRUMENTS VOID AT LAW.**—The equitable relief of cancellation of instruments may be resorted to even in the case of instruments void at law except where the invalidity of the instrument is apparent on its face. (Page 263.)
3. **EQUITY—JURISDICTION IN PROBATE MATTERS.**—Equity has no jurisdiction over the settlement of a guardian while it is still pending in the probate court. (Page 264.)
4. **CANCELLATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.**—An executed conveyance will not be cancelled unless the ground for cancellation is established by evidence that is clear, unequivocal and decisive. (Page 264.)
5. **WILLS—ELECTION.**—Where a will leaves property to a devisee and at the same time undertakes to convey property belonging to him to another, the devisee is required to elect whether he will take under the will or reject the provision of the will and retain his property. (Page 266.)
6. **WILL—REVOCATION OF ELECTION—RESTITUTION.**—Where an infant heir elects not to take under his father's will, and asks that a settlement with his father's widow, made in pursuance of the provisions of such will, be set aside for fraud, he must offer to restore what he received under that will. (Page 267.)

Appeal from Marion Chancery Court; *T. Haden Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

In 1897 W. C. McBee died testate. He left a widow, appellant, and one child by her named Lucy, and six children by a former wife. Appellee, Victor B. R. McBee, was one of the children, and at the time of his father's death was 12 years of age. By the will appellant was given what was designated as the "home place," containing about 476 acres, and she was enjoined by the testator to give his minor children, including appellee, "a home," and to "see after them in sickness, to oversee their educational inter-

ests, to direct and guide them till they reach their majority, or as long as they will be governed by her and listen to her advice." He also gave to appellant certain articles of personal property, and then one half of all the residue of personal property to be selected by her before any of his debts were paid. Then, after the payment of his debts, his children were to share equally the real and personal property remaining. He had a life insurance policy for \$6,000. The beneficiaries in the policy were appellee and two of appellee's sisters. The beneficiaries were to share equally in the policy. The will contained the following provision with reference to the life insurance:

"I also will that my life insurance be paid to my wife in twenty annual installments of \$300 each. She is to have one-third of same and the other two-thirds to be equally divided and used in educating Maud A., Myrtle M., Victor, B. R. and Lucy McBee, till they reach their majority, or so long as they each wish to go to school; but after they quit going to school their parts are to revert severally to my wife."

Appellant and one A. S. Layton were named as executors. The will was duly probated, and appellant and Layton entered upon the administration of the estate. Appellant as executrix made final settlement November 7, 1904, which was, at the August term, 1905, of the probate court, duly approved and confirmed. This settlement shows that appellee's share of the estate, apportioned according to the provisions of the will, not including the unsold lands, was \$1,778.21. Appellant was appointed guardian of appellee in 1898, and her final settlement as executrix shows that she credited herself as executrix with the above sum, and she passed same to her account as guardian. After her appointment as guardian, appellant surrendered the life insurance policy, and took in lieu thereof a bond with coupons attached, payable to appellee and his two minor sisters.

Appellee became of age February 20, 1905. On the 15th day of May, 1905, appellee executed to appellant deeds to his interest in the unsold lands of the estate in Arkansas and Texas, and at the same time and place he executed the following bill of sale:

"Know all men by these presents, that I, Victor B. McBee, formerly a son of W. C. McBee, deceased, and a brother of Lucy McBee, deceased, for and in consideration of the sum of twenty-two hundred dollars to me in hand paid by Winnifred M. McBee, the receipt of which is hereby acknowledged, do hereby bargain, sell and deliver to the said Winnifred M. McBee all and singular the following described personal property, towit: All the right, title and claim and estate which I have or may have either at law or in equity in and to all of the personal property of every kind belonging to the estate of W. C. McBee, deceased, and Lucy McBee, deceased. Such estate being notes, accounts, judgments and equitable life insurance bond, to have and to hold the said property unto the said Winnifred M. McBee and unto her heirs and assigns forever."

In December, 1907, appellee filed a petition in the probate court to have appellant make settlement of her account as guardian. In response to the petition appellant, at the May term, 1908, set up that she had paid out the money in her hands as guardian as she was authorized and directed to do under the will, as shown by her last settlement as executrix. She also set up that she had made full payment to and settlement with appellant after he became of age. Appellant also filed with the probate court her account as guardian of appellee in which she showed that she had received the sum of \$1,778.21, and that she had expended for appellee during his minority, for his education and maintenance, as directed by the will, the sum of \$1,831.78, and that since his majority she had paid him in cash the sum of \$500, making a total paid him of \$2,331.78, which was \$553.57 more than she had received and to which he was entitled, and she exhibited the vouchers showing the money she had paid him. Appellant further set up in response to the petition for settlement the following:

"On the 9th day of May, 1905, at his offer and solicitation after investigation, she agreed to pay him the further sum of \$1,125 for his entire remaining interest in the estate of his said father, W. C. McBee, real and personal, including the said life insurance, and all the interest which he might have in the estate of his sister, Lucy McBee, for all of which he executed

and delivered to her his deed and bill of sale and did pay him said sum."

Appellant asked that this account and showing be taken as a final settlement, and that she be discharged as guardian, and that her bond as such be canceled.

Appellee filed exceptions, setting up substantially the same facts as in his complaint herein, at the November term, 1908, of the probate court. Appellee filed his application for continuance, setting up that he had pending in the chancery court a suit to set aside and cancel the bill of sale upon which appellant was relying as a settlement with appellee, and asking that the probate court continue the cause pending before it until the trial of the cause in chancery to set aside the bill of sale and deeds was had. The probate court denied the application for continuance, overruled the exceptions to the appellant's account as guardian, found that appellant had fully accounted for and paid to appellee all of his estate that "came into her hands as guardian," and entered judgment discharging her. Appellee appealed to the circuit court, where the appeal is still pending. The suit in chancery referred to in the application for continuance mentioned above is the present suit instituted by appellee on the 6th day of May, 1908, two days after appellant had filed her response setting up the bill of sale as a settlement by appellee with appellant of her account with him as guardian. The purpose of the present suit was to cancel the deed executed by appellee to appellant, and also the bill of sale above mentioned, and to have appellant make her settlement as guardian in the chancery court. The complaint in substance alleged that appellant, as the guardian of appellee, took control of the latter's interest in the estate of his father, deceased, which consisted of an undivided one-sixth interest in a large amount of real estate, and interest in the personal estate amounting to \$1,500; that appellee was not advised as to whether he acquired his interest in the said estate by inheritance or by last will and testament; that appellant as guardian aforesaid collected from the estate of Lucy McBee, deceased, appellee's sister, his share in her estate, amounting to \$200. The complaint contains these further allegations and prayer:

"That at the death of W. C. McBee appellee was one of the beneficiaries in a life insurance policy for \$6,000 on the life of said W. C. McBee; that said guardian has collected on said policy \$2,700, one-third of which, under the terms of said policy, would be the property of appellee; that there remains due on said policy \$3,300, one-third of which would be the property of appellee, making the total value of his estate, in addition to his interest in the lands, the sum of about \$3,700; that from the appointment of said guardian until appellant reached his majority, on the 20th day of February, 1905, said guardian never filed with the probate court a settlement or statement of her guardianship; that the sum of about \$1,600 has been paid to or for this appellee for which said guardian should have credit; that on the 15th day of May, 1905, the appellant falsely and fraudulently represented to appellee that the only interest he had in his father's estate aforesaid was his interest in the lands above described, falsely and fraudulently representing to the appellee that he had no interest in the life insurance money so collected, and that he had no interest in the remainder of the said life insurance money to be collected, and falsely and fraudulently representing to the appellee that the said property owned by him was not of the value of more than \$1,000; that on the 15th day of May, 1905, the appellee, believing and relying on such false and fraudulent representations aforesaid, for the said inadequate consideration aforesaid executed and delivered to the appellant a deed to his interest in said lands; that at the same time, relying on said false and fraudulent representations aforesaid, he executed and delivered to the appellant an instrument purporting to be an assignment and settlement of all his interest in all his personal estate in her hands; the appellant well knew at the time of the execution of said deed, assignment and settlement that said representations were false and fraudulent and made for the purpose of cheating this appellee; that, had he known the condition of his estate, he would not have executed said deed and assignment, and that said settlement is unfair, unjust and inequitable and should be canceled; that, on an accounting, the defendant will be found due the appellee as his guardian a large amount of money over and above all that she has ever paid him, for which she is en-

titled to credit on account of said deed and assignment; that there is no necessity for a further administration of the estate of the appellee in the probate court, as there are no debts owing to said estate, nor are there any debts due said estate that would require the assistance of his guardian or the probate court; that, after the cancellation of the instruments above described, the only thing remaining to be done would be to ascertain the amount due from said guardian to her ward and direct payment of the same. Wherefore he prays that said deed and settlement and assignment be canceled; that appellant be required to account in this court for her said guardianship, and that she be required to pay over the amount of money and property found due said ward and all other proper equitable relief."

The appellant moved to have the complaint made more specific, and among other grounds alleged that it does not show or state whether he claims to have acquired said estate by inheritance as an heir of said W. C. McBee or by a last will and testament of the said W. C. McBee; that said complaint is indefinite and uncertain in that it does not show that he was the owner of the money collected and to be collected on said life insurance policy or merely claims it because his name appeared in said policy as a beneficiary; that said complaint is indefinite and uncertain, in that it does not show or state whether said guardianship has been settled in the probate court and passed from the jurisdiction of said court and he is seeking to open the settlement made in said court and surcharge same, or that said guardianship is still pending in said court and within its jurisdiction.

The motion was overruled. Appellant then demurred on the ground that the complaint did not state facts sufficient to give the court jurisdiction and did not state a cause of action. The demurrer was overruled, and appellant answered and set up that she had received as executrix of the will of W. C. McBee the interest of appellee in the real estate which had been sold, and in the personal property amounting in the aggregate to \$1,778.21, as shown by her settlement as executrix, and that she had fully administered the same and had paid to appellee in excess of what came to her hand as executrix the sum of \$5,335.70; that her settlement with the probate

court fully adjudicated all expenditures made for him. She further set up that Lucy McBee was her child; that she had died, and appellant, her mother, had inherited her share of her father's estate. She set up the provisions of the will as to the life insurance; alleged that appellee had attended school for seven years, and that she had paid him of the life insurance money the sum of \$350, according to his father's will, which was all that was due him under the terms of the same. Further answering, she set up her purchase of appellee's interest in the real estate and personal property after he became of age, and for which she paid him the sum of \$1,125, and in full settlement of her guardianship.

She denied that she made any false or fraudulent representations to him about his interest in said estates or as to their value, but states the facts to be that she fully advised him of all property in which he held an interest, its true condition and value, and that, as he was of full age, they had a full, fair and complete settlement, in which he ratified all expenditures made for him during his minority and all moneys, clothing and other things of value which she had furnished him during said period of time.

She set up that her settlement as guardian of appellee was pending in the probate court at the time this suit was instituted, in which she was to account in full for all funds coming into her hands and expenditures made by her under the last will and testament of W. C. McBee, and by appointment as guardian by the probate court of Marion County. She avers that the appellee appeared in the probate court and filed exceptions to said settlement, raising the same issues as contained in his complaint here. She attached a copy of the exceptions, and made it a part of her answer, and alleged that the court overruled the exceptions and confirmed said settlement. She set up that the chancery court had no jurisdiction, and prayed that appellee's complaint be dismissed.

The testimony of appellee was to the effect that he signed the deeds and bill of sale, believing that it was only a deed to his interest in the land that he was signing; that appellant had offered him \$1,000 for his interest in the land only, and that he accepted the offer, and when he signed the papers he did not

read them. In explanation of why he did not read them he said that "his mother died when he was small, and appellee took the place of his mother, and he trusted her like any boy would trust his mother; never thought of anything wrong; had absolute confidence in her and what she said, and did not think it was necessary to read the papers." He asked her in the notary's office "if it was just for the land only, and she said it was," and he "never examined the papers, but trusted her, and just signed my name where she pointed out for me to sign." He said he had never handled a deed or bill of sale before, and did not know how many parts there were to a deed; did not understand a deed. "If," he says, "I had known that I was selling my interest in my personal property and life insurance, I would not have signed the papers." On the other hand, the testimony of appellant was to the effect that she paid appellee the sum of \$1,125 for his interest in the land and for the interest he claimed in Lucy McBee's estate, and for his entire interest in the personal property of every character that he claimed in his father's estate. She states that, in answer to letters from appellee requesting her to send him money, she had written him that he did not have any more money in her hands, that his account was overdrawn. She wrote him that the only interest he had was the land. He asked her what it was worth, and she told him she thought it was worth \$1,000. "Before he came down (referring to the time when the deal was finally consummated), she says, "we had passed some letters in regard to the estate, and I had made him an offer. Then I received a letter, a few days before he came down, that he would accept the offer for his land, and to send him some money at Eureka, but he followed up his letter in a few days, and then was when we made our trade." She was asked if land "was not the only thing she was buying," and replied: "We just made our talk, and each agreed that I would buy his interest in his father's estate and in Lucy's estate is the way we made the talk exactly—that I was buying whatever interest he might have." She testified that after the trade was thus agreed to they went to the law office of S. W. Woods to have him draw up the papers; did not find him, but his brother and partner, John H. Woods, was in the office, and they talked to him about the matter. She asked him to go with appellee to the court

house and get the papers, so they could look over them, and so that appellee would be satisfied with the deal they had made. She states the different settlements were shown him. At that time he didn't say anything. He seemed to be satisfied with the account; said he was. John H. Woods was not familiar with the business, and they decided in his presence that appellant should pay appellee \$500, as he was in a hurry to go to Eureka and wanted to get away that day. They arranged for appellant to have the papers prepared and to take them to Eureka where appellee was to execute them, and she was to pay him the balance of the \$1,000; all of which was done. She stated that appellee at the time he signed the papers fully understood them. She handed the deeds and bill of sale to him, and he handed them to the notary. The notary looked at them, and said there are two deeds and a bill of sale. The papers were separate. She did not show him where to sign. The notary was doing that; appellee then signed them, and the notary took his acknowledgments. Appellee knew at the time that she had inserted in the bill of sale the life insurance matter, because she told him she was going to insert it and what the personal property consisted of, which was notes, accounts, money and Equitable Life Insurance policy." Much of appellant's testimony had reference to the manner in which she disposed of the funds of appellee, and was relevant only to the question of accounting, and not necessary to set forth on the issue of setting aside the instruments. She testified as to the correspondence between them, and exhibited some of the letters of appellee to her. Among these was one dated February 28, 1905, in which he asked appellant why she had not sent the \$100, requested in a former letter, and further stated as follows: "I guess we had better settle up our business. You pay me my part of the estate, and it won't be any bother to you hereafter. What has become of my father's life insurance? It was to be used to educate Myrtle, Maude and myself. Let me hear from you at once." In a letter of April 18, 1905, he wrote appellant, wanting to know why she had not sent him \$500 that he had written for some time before, saying he needed the money. In this letter he further stated that he was going to Eureka, and if he did not get the money he would have to come home and find out what was the matter; and

further stating, "Maybe I had better come home anyway and fix up the estate. This monkey business is getting old." These letters were written after appellee became of age, and the last one but a few weeks before he executed the deeds and bill of sale. E. C. McBee, a brother of appellee, testified that in a conversation with appellee about the last of April or the first of May appellee stated he would have to go down and settle up with appellant. Witness told him "to be sure to get what was coming to him." After he came back witness asked him if he got all that was coming to him, and he replied: "You need not be uneasy. I got all that was coming to me." It was shown that appellant received from the administrator of the estate of Lucy McBee the sum of about \$840. Appellant testified that two courts had decided that she was the owner, but she concluded notwithstanding to distribute it among the McBee children. She had her settlement with appellee before the estate of Lucy McBee was settled, and they estimated that \$25 would be appellee's one-sixth. However, it was afterwards ascertained that the exact amount was \$140. It was in evidence that appellee's interest in the real estate at the time he sold same to appellant was not worth more than \$500.

The testimony of John H. Woods corroborated the testimony of appellant to the effect that the trade agreed upon between appellee and appellant while in his office contemplated the transfer of the entire interest of appellee in the McBee estates and the final settlement of all the matter between them, including her guardianship.

It was shown that appellee did not make any claim to an interest in the McBee estate for more than two years after he executed the deeds and bill of sale mentioned above, and he did not bring his suit to set these aside until three years, lacking one day, had elapsed. His explanation of this was that he did not know that his name appeared in the insurance bond until the latter part of May or first of June, 1907, when his attorney in Kansas City looked through the papers and reported that the policy was payable to appellee and his two sisters; that was all he knew about it before that time except that a portion of his father's insurance was to be paid for his tuition. Appellee had, however, after he became of age, signed one of the insurance coupons which showed on its

face that the policy was made payable to him and his two sisters.

The chancery court, among other things, found that the appellee entered into the private settlement with, and executed the bill of sale to, appellant without understanding his rights, and without full knowledge of the facts pertaining thereto, and that there was no consideration paid to appellee by appellant for said settlement and bill of sale. The court then entered a decree cancelling the bill of sale, and transferring the branch of the case asking for an accounting to the circuit court where the probate settlement was pending on appeal.

Appellant appealed from the entire decree, and appellee appealed from that part of the decree which transferred the matter of accounting to the circuit court.

S. W. Woods, for appellant.

1. It is clear from the terms of W. C. McBee's will that he intended that appellee and his sisters should accept the property and other benefits secured to them by the will in lieu of their interest in his life insurance. Appellee could not accept these benefits and at the same time retain his full interest in the life insurance. Jarman on Wills 386; 13 L. R. A. 567 and notes; 4 L. R. A. (N. S.) 1065 and notes; 63 Ill. 285; 52 Ark. 473; Bispham, Eq., § 295; 73 Ark. 344; *Id.* 221.

2. The chancery court was without jurisdiction; appellant's settlement was still pending in the probate court at the time this suit was brought. 32 Ark. 186; 33 Ark. 575; 20 Ark. 526; 49 Ark. 51. A bill in equity to surcharge a guardian's settlement will only lie for fraud or mistake, and it should set out with precision the false or fraudulent charges or credits. 14 Ark. 360; 48 Ark. 544; Woerner on Guard. 365; 49 Ark. 31; 51 Ark. 1.

3. Where, by the provisions of a will, the executor is directed to expend a portion or all of a minor's interest in the testator's estate for the support and education of the minor, the executor is in effect made a testamentary trustee, and the court would have no power, while the executor faithfully discharges his duty, to order him to pay over any money or property to the statutory guardian. Woerner on Guard. 57; 97 Ill. 429. Where the same person is executor or administrator of

the estate of a decedent, and guardian of his minor children, liability as guardian begins only where his accounts as executor or administrator show a transfer to his account as guardian. 9 Am. & Eng. Enc. of L. 122, 123; 48 Ark. 544; Woerner on Guard. 57.

4. Appellant should be allowed credit for money expended in the education and support of the minor. In equity appellee will not be permitted to reject or disallow expenditures made for his benefit, unless he himself does equity. He cannot assail the settlement for fraud in taking credit for such expenditures. 48 Ark. 386; *Id.* 297; 83 Ark. 223.

5. Even if there were any fraud, either actual or constructive, perpetrated in this case, yet the appellee has not placed himself in a position to ask for equitable relief by restoring what he has received, or making proper compensation for the benefits received. 1 Beach, Mod. Eq. Jur. § § 67, 137; 25 Ark. 196; 53 Ark. 16.

6. Fraud will not be presumed, but must be proved and expressly found. Fraud and injury must concur to furnish ground for judicial action. 11 Ark. 378; 53 Ark. 275; 12 Ark. 296.

J. W. Black and Sam Williams, for appellee; *Thomas M. Pratt*, of counsel.

1. W. C. McBee had no right to dispose of the life insurance by will. The interest of the beneficiaries was vested by the terms of the insurance contract. 12 S. W. 477; 17 S. W. 874; 71 Ark. 295. Before an election can be required, it must clearly appear from the instrument itself that an election was intended. Jarman on Wills, 425-6-7. Moreover appellant is estopped. Kirby's Dig. § 3827.

2. The chancery court had jurisdiction. The case had passed beyond the jurisdiction of the probate court by reason of the private settlement and bill of sale, and there was no remedy at law. 90 Ark. 444; 42 Ark. 186; 48 Ark. 544; 33 Ark. 727. Where there is fraud, there is equity jurisdiction. 33 Ark. 425.

3. Whether acting under the will or by appointment as guardian, appellant is chargeable with money and property received. Kirby's Dig. § 3763. She will not be permitted to confuse her settlement as executrix with her account as guardian. 21 Cyc. 275-6.

4. The will in this case confers no greater authority with reference to the support and education of the minor than that conferred upon a guardian by statute. Kirby's Dig., § 3777. And the statute controlling expenditures, *Id.* § 3792, is mandatory. Expenditures made, not in compliance with this statute, are at the peril of the guardian. 63 Ark. 450; 49 Ark. 75. See also 21 Cyc. 169.

5. The evidence shows that the only interest appellee thought he was selling, and appellant was claiming to buy, was his interest in the land. On a settlement appellant is entitled to credit for what she has paid lawfully to or for appellee, and is chargeable with what she has received. The land and the amount paid for it, should not be considered. Such settlement would place appellant *in statu quo*. Appellant is not entitled to money expended by appellant before he was 21 years of age. Kirby's Dig., § 2792; 63 Ark. 450.

6. The bill of sale should be cancelled. To sustain a private settlement with a ward, the guardian must show that he fully disclosed the condition of the ward's estate, exercised no undue influence and that the settlement was fair and equitable. 21 Cyc. 169-170.

WOOD, J. 1. Cancellation of instruments is one of the well-recognized grounds of equity jurisdiction. It operates indirectly to establish or protect primary rights. It is often granted as ancillary and "preliminary to the final relief by which a party's primary right, estate or interest is established and enforced." It is a remedy which belongs exclusively to the equity jurisdiction, and is exercised in order to remove the obstacle which stands in the way of the enjoyment of one's right, interest or estate. "The occasions giving rise to the jurisdiction are mistake, fraud and other instances where enforcing instruments or agreements would be inequitable or unjust. A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference, but it is now well settled that jurisdiction will be exercised in such cases except where the invalidity of the instrument is apparent on its face." Pomeroy, Eq. Jur., § § 170-2, 1377. But, while the

chancery court had jurisdiction of the subject-matter of the cancellation of the deeds and bill of sale, it had no jurisdiction over the settlement of the guardian while that was still pending in the probate court. The bill of sale on its face was evidence of the settlement of appellant with appellee. But it was not the settlement itself. Unattacked for fraud or mistake, it would have to be taken as conclusive evidence of the settlement. Hence appellee could go into chancery to have the bill of sale cancelled. Such relief was only ancillary to the settlement itself, and, the bill of sale being out of the way, the question of settlement still remained in the probate court. The chancery court therefore did not err in refusing to entertain the question of accounting, leaving that matter for final determination by the probate court. This is not a complaint to surcharge and falsify a confirmed settlement in the probate court for fraud. As to the accounting, it is sought to take it out of the probate court before that court has finally disposed of it. That can not be done. *Coppedge v. Weaver*, 90 Ark. 444; *Turner v. Rogers*, 49 Ark. 51; *Hankins v. Layne*, 48 Ark. 544; *Dyer v. Jacoway*, 42 Ark. 186.

2. The next question is, did the court err in setting aside the bill of sale? Says Professor Bispham: "Cancelling an executed conveyance is the exertion of a most extraordinary power in courts of equity, and when asked for on any ground it will not be granted unless the ground for its exercise most clearly appears." Bisp., Eq. Prin., § 475. The evidence to overcome the "written memorial must be clear, unequivocal and decisive." *Carnall v. Wilson*, 14 Ark. 167; *Rector v. Collins*, 46 Ark. 167; *McGuigan v. Gaines*, 71 Ark. 614; *Goerke v. Rodgers*, 75 Ark. 72.

Appellee alleges and contends that the mistake he made in signing the instruments was caused by the misrepresentation and concealments of appellant and his misplaced confidence in her. In other words, he charges appellant with actual fraud, and seeks relief solely on that ground. The evidence fails to convince us that appellee is the victim of misplaced confidence. He says he trusted the appellant as a boy would trust his mother, and hence signed the papers without reading them and without understanding them, and thought that he was only signing a deed to the land, as that was what appellant repre-

sented. In the light of all the other evidence, we are of the opinion that there was no misrepresentation and no concealment upon the part of appellant. Nor did appellee execute the instruments through any misapprehension caused by appellant, or because of any trust and confidence reposed in her. His own letters and the testimony of his own brother show that before the instrument was executed he had begun to distrust appellant, and that he was determined, when he made the settlement with her, "to get all that was coming to him." He assured his brother of that fact, and there is no doubt from all the testimony in the record that when he made the settlement with appellant and when he executed the instrument evidencing such settlement he was dealing with her at arm's length. Appellee was of age, had received excellent advantages of education, and the record does not disclose any evidence of mental imbecility on his part, but rather the opposite. The law is that "a settlement of a guardian with his ward shortly after the latter's majority will be closely scrutinized. The burden of proving good faith rests upon the guardian. To sustain a private settlement, the guardian must show that he fully and clearly disclosed the condition of the ward's estate at the time of the settlement, that he exercised no undue influence, and that the settlement is fair and equitable." 21 Cyc. 169. The conduct of appellant in dealing with appellee measures fully to the required standards. There is a general finding by the court that appellee executed the bill of sale to appellant "without understanding his rights and without full knowledge of the facts pertaining thereto." The evidence does not warrant the finding that appellee signed the bill of sale without full knowledge of the facts pertaining thereto. The testimony of appellant is certainly entitled to as much credit as that of the appellee. Appellant testifies (and her testimony is corroborated) that appellee did understand that the settlement was to be a full settlement, and that she explained everything thoroughly pertaining to the McBee estates.

Appellee testified that he did not know, at the time he signed the bill of sale, that the life insurance was payable to him and his sisters, but the testimony of appellant shows that as early as 1903 he knew that the insurance was payable to him and his sisters, Myrtle and Maude, and his own testimony shows that

after he was of age, and in February or March before he signed the bill of sale, he signed one of the insurance coupons which showed on its face that he was a beneficiary in the policy. He testified that he did not know that the bill of sale included his interest in the life insurance policy, but again he is contradicted by appellant, who says that she told him that she "was going to insert it in the bill of sale," and "what the personal property consisted of, which was notes, accounts, and money and Equitable life insurance policy." The decided preponderance of the evidence is against him on the facts. The record, however, does disclose that both appellee and appellant were ignorant of the law giving to appellee the right, if he elected, to take his interest in the life insurance, notwithstanding the testator had disposed of it in his will and had given most of it to appellant. Conceding that appellant as guardian should have known the law in this respect and should have imparted that knowledge to appellee, still it does not follow that the bill of sale should have been cancelled under the facts of this record.

It clearly appears that in a settlement with appellant appellee would have to accept the provisions of the will as to the disposition of his insurance money, or else repudiate the will and reimburse appellant the amount she has lost by reason of such repudiation. The language of the will is unmistakable. The testator disposed of the insurance money of appellee, giving most of it to appellant and making other provisions for appellee in the will. Its language is such as to require an election on the part of appellee. "The doctrine," says this court in *Fitzhugh v. Hubbard*, 41 Ark. 68, "rests upon the principle that a person claiming under an instrument shall not interfere, by title paramount to prevent another part of the same instrument from having effect according to its construction. He can not accept and reject the same instrument. * * * If he chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary." See other authorities cited by appellant and *McDonald v. Shaw*, 92 Ark. 15. Now, under the will appellant received of the insurance money belonging to appellee the sum of \$1,650. If appellee rejected the will, then he would have to reimburse appellant out of the other property which he received under the will.

If appellee was ignorant of his rights when he executed the deeds and bill of sale, he was full panoplied with legal advice when he went into a court of chancery nearly three years after to have those instruments set aside. He was not ignorant then, yet he seeks the equitable remedy of cancellation without himself offering to do equity. He should be held to his election, either to accept the terms of the will or to reject them. He cannot hold on to the estate given him by the will, and take away from appellant the part of his estate that was given to her. He must renounce the will and take the property, making compensation to appellant out of the other property given to him by the will for the loss she has sustained by reason of his renunciation, or else he must content himself with the provisions made for him in the will. He can not take all of his property under the will and his insurance money, too. But this is precisely what he is trying to do. He does not offer in his complaint to restore to appellant, if she desires, the purchase money that he received from her for the lands and other property conveyed and transferred to her, for which she paid him the sum of \$1,125. He did not offer, if the deeds and bill of sale were cancelled, to take back the land and to return the purchase money given in consideration for these conveyances. He did not propose, and the court did not require as a condition upon which the relief would be granted, that he put appellant, as far as possible, *in statu quo*. This was indispensable to any relief. Furthermore, if this had been required, and appellee had been held to his election under the will, still this record discovers no facts to warrant the court in granting him the extraordinary remedy of cancellation of full settlement he had made with appellant. For, if appellant be charged with all that she received of the estate of appellee under the will, and credited with all she paid out to and for him and reimbursed the life insurance money she would lose by his election, then she would owe him nothing. The testimony shows the interest of appellee in the land at the time the bill of sale was executed was worth not exceeding \$500, and the interest he claimed in the Lucy McBee estate amounted to \$140. This makes a total of \$640 that appellant paid appellee for his interest in the land and in the McBee estates if the notes, accounts, and insurance money were not to be included in the settlement, as appellee contends. But appellant actually paid

the sum of \$1,125, or the sum of \$485 in excess of the value of appellee's alleged interest in the Lucy McBee estate and his interest in the unsold land of his father's estate. This court may consider what would be the result of a settlement under the facts of this record in order to determine whether there is any equity in appellee's complaint. The result of such a settlement, stating the account according to the undisputed facts, would be about as follows:

Winnifred McCracken, Guardian, in account with Victor B. R. McBee, her ward:

DR.

To amount of estate not including life insurance.....	\$1,428.21
To value of land and interest in Lucy McBee estate...	640.00
To life insurance money	2,000.00
	<hr/>
Total	\$4,068.21

CR.

By amount conceded by appellee	\$1,600.00
By life insurance money to be returned to her.....	1,650.00
By amount paid for land and interest in McBee estate..	640.00
By amount of difference as consideration paid for settlement	485.00
	<hr/>
Total	\$4,375.00

making a difference in appellant's favor of \$306.79.

In no event, therefore, could appellee be benefited by a settlement, and the court erred in cancelling the evidence of such settlement.

Reversed and dismissed for want of equity.

GRIFFIN v. LONG.

Opinion delivered October 24, 1910.

1. PRINCIPAL AND SURETY—LIABILITY OF PRINCIPAL.—A principal is liable to indemnify his surety for any payment he may be compelled to make for his principal. (Page 271.)

2. **SAME—WHEN LIABILITY ACCRUES.**—One who signs a note as surety for another becomes a creditor of the latter at the time he signs the note, and not at the time he pays the same. (Page 271.)
3. **SAME—EFFECT OF SIGNING RENEWAL NOTE.**—Where a surety signs a note with his principal in renewal of a former note executed by him, such renewal note does not witness a new indebtedness, and the liability of the principal to such surety was contracted when the original note was executed. (Page 271.)
4. **CORPORATIONS—DEFAULT OF OFFICERS—LIABILITY.**—Under Kirby's Digest, § 859, fixing upon the president and secretary of any business corporation a liability for all debts of such corporation contracted during the period they neglected or refused to file the report of the corporation's financial condition, a note originally executed before but renewed during such period was not "contracted" during the period of default. (Page 274.)

Appeal from Pulaski Circuit Court, Second Division;
F. Guy Fulk, Judge; affirmed.

Marshall & Coffman, for appellant; *R. L. Rogers*, of counsel.

"The liability of the principal to indemnify his surety is a debt contracted within the meaning of the statute, and arises at the time when the surety signs the note," etc. 10 Cyc. 858. A surety may secure the same debt several times in succession when it is renewed by the debtor, but it is not his debt nor his renewal, and each time he secures it he enters into a new contract with his principal.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

Where an indebtedness has been extended from time to time by the execution of several renewal notes, the date of the contracting of the debt relates back to the date when the first note was executed. If the first note was executed before any annual report became due, or while the corporation was not in default, then no cause of action against the officers accrued to the payee of the note or to the surety thereon. Thompson, Com. Corp., par. 4222; 101 U. S. 188; 10 Cyc. 858; 106 Mass. 131; 16 Gray 142. The giving of a note in renewal of a previous note is not a payment of the first note, and does not create a new indebtedness, in the absence of an agreement to that effect. 5 Ark. 569; 48 Ark. 267; 51 Ark. 300; 68 Ark. 233; 84 Ark. 220.

FRAUENTHAL, J. This was an action instituted by a creditor of a domestic corporation to recover judgment against its

president and secretary for his debt which he alleged was contracted during the period when the president and secretary neglected to file the annual statement showing the condition of said corporation. In his complaint the plaintiff alleged that the Argenta Wholesale Cigar & Tobacco Company was duly organized as a corporation under the laws of the State of Arkansas on September 12, 1907, and that on December 17, 1907, the appellant and others as sureties for said corporation executed a note to the Twin City Bank for \$500; that on April 4, 1908, the said note was taken up and renewed for the same amount by the corporation executing a note as principal with the appellant and the other said parties as sureties to the same payee with the date of maturity extended; that this note was taken up and renewed from time to time in the same manner until December 1, 1908, when the said corporation as principal and the appellant and the said other parties as sureties executed the last renewal note therefor to said payee due ninety days after its date. This note was not paid when due, and the payee instituted suit and recovered judgment thereon against said sureties on June 28, 1909, and on July 22, 1909, appellant paid thereon the sum of \$183.85, for which sum he seeks by this suit a recovery against the president and secretary of said corporation. He alleged that by virtue of section 848 of Kirby's Digest it was the duty of said president and secretary of said corporation to file a report of the financial condition of said corporation on July 1, 1908, and not later than August 15, 1908, and that the said officials of said corporation wholly failed to file said report, thereby rendering themselves liable for said debt of said corporation to appellant under section 859 of Kirby's Digest. The court sustained a demurrer to this complaint, and rendered judgment accordingly.

This was a suit to recover a debt of the principal due to his surety for what he had paid for such principal. The principal in this case was a corporation, and the action was brought to recover the debt from certain officers of said corporation. The action is founded upon the statutes of this State which provide that said officers of a corporation shall at stated times file reports of the financial condition of the corporation, and upon a failure or refusal to do so said officers shall jointly and severally be liable "for all debts of such corporation contracted during

the period of such neglect or refusal." Kirby's Digest, § § 848, 859. The material question involved in this case is: When, under the allegations of the complaint, was the debt due by the corporation to appellant, its surety, contracted? When one becomes surety for a principal, a liability arises upon the part of the principal to indemnify his surety for any payment which he may be compelled to make for the principal. *Hill v. Wright*, 23 Ark. 530; *Rice v. Dorrian*, 57 Ark. 541. The principal thus becomes indebted to the surety for the payments he is compelled to make for the former, and the question which arises is, does such indebtedness have its inception from the time the party became surety or from the time payment is made by the surety? The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same. In the case of *Wiggin v. Flower*, 5 Rob. (La.) 406, it is said: "Though the obligation of a surety cannot be enforced till after the event on which it becomes absolute, it exists from the time it was contracted, so the rights of the surety against his principal exist before the obligation of the former becomes absolute."

In the case *In re Stout*, 106 Fed. 794, it is said: "The payment of a note by a surety relates back to the signing of the note for the purpose of fixing the date when the indebtedness of the principal to him on account of such payment had its inception." In *Rice v. Smithgate*, 16 Gray, 142, it was decided that "the liability of a principal to indemnify his surety for any payment that the latter may be compelled to make for the former takes effect from the time when the surety became responsible for the debt of his principal, and that upon payment by the surety his debt is a debt contracted at the time he became responsible and not at the time of such payment." See also *Byers v. Franklin Coal Co.*, 106 Mass. 131; *Loughridge v. Rowland*, 52 Miss. 456; *Berger v. Ewing*, 91 Mo. 397.

But it is urged by counsel for appellant that, while the liability of the corporation to appellant as his surety did not take effect on July 22, 1909, when he paid the surety debt, it did take effect on December 1, 1908, when said last renewal note was executed, and not on December 17, 1907, when the original note was given. As to the principal debtor, the rule of law is well settled that the execution of a note in renewal of a previous

note or debt is not a payment of such prior note or debt, nor the creation of a new indebtedness, unless there is an express agreement to that effect by the parties. *Real Estate Bank v. Rawdon*, 5 Ark. 569; *Henry v. Conley*, 48 Ark. 267; *Stull v. Harris*, 51 Ark. 300; *Triplett v. Mansur-Tebbets Implement Co.*, 68 Ark. 233; *Daniel v. Gordy*, 84 Ark. 218. But it is urged that this rule does not apply to the surety on a note that is renewed, although the renewal is executed by the same principal and surety, because the original debt is the debt of the principal, and not of the surety, so that it is the debt of the principal that is renewed, and not the debt of the surety. But a surety is bound to the same extent as his principal, and his undertaking is identical with that of the principal. "By signing the paper he enters into no new or different contract to the payee from that into which his principal has entered. Their obligation is generally contemporaneous and joint." *Brandt on Suretyship and Guaranty* (3 ed.) § 3. The liability of the surety to the payee is equal with that of his principal, and the only manner in which he can become discharged from that liability is by the actual payment of the debt or by an alteration of the contract or an extension of the time of payment of the debt founded upon a consideration and without his consent. *Brandt on Suretyship & Guaranty*, § 376; 32 Cyc. 191. But where the surety, at the time or before such extension of the time of payment of the debt is granted to the principal, consents thereto, he is not thereby discharged. *Brandt on Suretyship & Guaranty*, § 379; 32 Cyc. 159. When, therefore, a note or debt is renewed by the execution of a new note therefor, it is but an extension of the time of payment of such prior note or debt. And when the surety on such prior note executes such renewal note with the principal, he consents thereby to the extension of the time of the payment of such prior note. The original relation and liability of the surety is not changed by the execution of the renewal note thus signed and consented to by him. As to the surety thus executing the renewal note, the prior note for which the renewal note is given is not discharged, and by the execution of the renewal note a new indebtedness is not incurred, and a new relation as surety is not assumed. It is as to the surety simply an extension of the time of payment of the original note or debt, in the same manner and to the same extent as it is to

the principal, and a consent by such surety to such extension. We, therefore, conclude that the debt of the corporation to appellant, its surety, for the amount he paid for his principal was contracted at the date of the execution of the first note by the principal and surety, which was on December 17, 1907, and was not contracted at the date of the execution of any of the notes given in renewal of said first note. This debt or liability of the corporation, who was the principal on the note, to the appellant, its surety, was a "debt" within the meaning of section 859 of Kirby's Digest fixing upon the president and secretary of such corporation a liability "for all debts of such corporation contracted" during the period of any neglect or refusal to file the report of the financial condition of such corporation required by section 848 of Kirby's Digest. 10 Cyc. 858. But by this statutory provision the liability of such defaulting officers only extends to the debts contracted during the period of such default. As we have seen above, the giving of a note in renewal of a prior note or debt is not a payment of such prior note or debt. It does not constitute a new indebtedness. The time when such debt is contracted is not when the renewal note is executed, but when the original debt was made and the original note given. So that the liability of the defaulting officials of the corporation to its creditors under the above provisions of our statute is determined by whether or not such officers were in default at the time the original debt was made or the original note given to such creditor. The rule is well stated by Mr. Thompson in his Commentaries on Corporations, § 4222, as follows: "The principal question which relates distinctly to these statutory provisions, and which is not common to all statutes imposing a personal liability upon directors for official defaults, has reference to the time when the debt for which the director may be charged is deemed to accrue. If there has been a default in making the reports required by such statute during a particular year, and during that year a debt is contracted, and during a subsequent year, within which the directors are not in default in the making of their reports, a promissory note is given for the debt, it would seem that, for the purpose of relief afforded the creditor by the statute, the debt ought to be deemed to have accrued from its original inception, and not from the making of the note. And this is obviously the correct view. The reason

of the statute is to require corporations to make such a public showing of their affairs as will enable those dealing with them to determine whether they can safely give them credit; and the mischief at which it is aimed is not done unless the credit was actually given during the period of default. Moreover, this view conforms to the general doctrine of the courts that a promissory note given for an antecedent debt is not a payment of the debt, but merely an evidence of it—an additional security." See also *Steam-Engine Co. v. Hubbard*, 101 U. S. 188.

By the allegations of the complaint the original note was executed by the corporation as principal and by the appellant as one of its sureties on December 17, 1907, and all other notes executed by them were only in renewal thereof. The date of the debt thus contracted by the corporation to its surety was on December 17, 1907. But on that date the officers of the corporation were not in default by reason of a neglect or failure on their part to file the report of the financial condition of said corporation. The corporation was organized on September 12, 1907, and under said above statute (Kirby's Digest, § 848) such report was not required to be filed on or before December 17, 1907. It follows that the debt of the corporation to appellant, its surety, was contracted on December 17, 1907, and not during the period of any neglect or refusal on the part of the president and secretary of said corporation to file the report of its financial condition; and that the said officials are not liable for such debt.

The judgment is accordingly affirmed.

BELFORD v. STATE.

Opinion delivered October 17, 1910.

1. COURTS—PLACE OF MEETING.—A court can meet only at the place that is appointed by law, and its judicial power can be exercised only at such place. (Page 278.)
2. SAME—PLACE OF MEETING OF COUNTY COURT.—The county court of Clay County, under the act of February 23, 1881, meets only in the Eastern District of the county, and its jurisdiction extends over the entire county. (Page 278.)

3. **COUNTY COURT—APPEALS.**—Appeals from the county court of Clay County lie to the circuit court for the Eastern District of that county. (Page 279.)
4. **BASTARDY—SUFFICIENCY OF EVIDENCE.**—Proceedings to affiliate a bastard child being of a civil nature, the jury may find that the defendant is the father of the child upon the testimony of the mother alone. (Page 279.)
5. **SAME—PROOF OF ILLICIT INTERCOURSE.**—As it is not competent to impair the credit of a witness by proof of specific acts of immorality, it is not admissible to prove, in a proceeding to affiliate a bastard child, that the mother has had intercourse with others than the defendant, unless such testimony is confined to a period when in the course of nature the child could have been begotten. (Page 279.)
6. **SAME—DISCRETION OF TRIAL COURT.**—A judgment of the circuit court in a bastardy proceeding awarding the maximum amount allowed by law for lying-in expenses and maintenance of the child will not be reversed because there was no proof as to the amount of such expenses. (Page 280.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith*, Judge; affirmed.

Moore & Bloodworth, for appellant.

1. Since this is a civil action, and both parties reside in the Western District of Clay County, and the cause of action, if any, arose there, the circuit court of Clay County for the Eastern District was without jurisdiction. Acts 1881, p. 21, § § 3, 5, 6; 1 Words and Phrases, 493; 40 N. Y. Supp. 871-873, 8 App. Div. 444; 70 N. C. 137; 51 Pac. 256; 3 Fed. Cas. 796; 29 Ark. 62.

2. There is no evidence to support the jury's verdict for lying-in expenses and maintenance. There is no evidence that any lying-in expenses were incurred, or that anything was claimed on that account. Kirby's Dig. § 486; 88 Ark. 20 and cases cited; 5 Cyc. 669.

3. The court erred in excluding testimony offered to prove intercourse of prosecutrix with another party besides appellant prior and subsequent to the fall of 1906. Such proof was admissible for the purpose of impeachment, and because, the prior intercourse once proved, the presumption arises that the illicit relation continued during the period in question, while the subsequent intercourse, if proved, strengthens that presumption. 21 N. W. 161; 44 N. W. 824; 124 S. W. 766.

4. Appellant's defense was that he was not the father of

the child. In view of the testimony of the witness Compton that he had had intercourse with prosecutrix during the fall of 1906, appellant was entitled to an instruction embodying this defense. 124 S. W. 806. Where a woman has had intercourse with two or more men within the period when, in the ordinary course of nature, the child might have been begotten, she cannot testify who its father is. 3 Am. & Eng. Enc. of L. 882, and note p. 883; 47 Wis. 111.

Hal L. Norwood, Attorney General and *William H. Rector*, Assistant, for appellee.

1. In bastardy proceedings the general character of the prosecutrix is not in issue; and proof of acts of intercourse, prior to and subsequent to the time of conception is not admissible. 103 Mass. 46; 118 Mass. 602; 61 Ia. 538; 91 Ind. 82; 126 Mass. 176. Acts of intercourse with other men than the defendant are only admissible in evidence when they occurred within the period when the child might have been begotten. 68 Ind. 401.

2. Corroboration of the mother's testimony is not necessary. Kirby's Dig. § 492; Underhill on Crim. Ev. § 529; 5 Cyc. 664; 2 L. R. A. (N. S.) 619; 92 Ark. 200.

3. The court had jurisdiction. The act of February 23, 1881, makes no provision for two county courts, or for any change in the county court, which is held, and has been held since before the passage of the act, in the Eastern District of the county.

FRAUENTHAL, J. This was a proceeding to affiliate a bastard child to the defendant and to secure from the alleged father the lying-in expenses and the support of the child. It was begun in the county court of Clay County, and from an adverse judgment in that court the defendant filed an affidavit and prayer for appeal. The Clay County Court granted the appeal, and directed the clerk of said county court to transmit the papers in the proceedings and copies of the record entries to the circuit court of the Eastern District of Clay County, which was done, and the cause was duly docketed in that court. Thereupon the defendant filed a motion in the circuit court of the Eastern District of Clay County to transfer the cause to the circuit court of the Western District of said county for the reason that the defendant and mother of the child were resi-

dents of said Western District of Clay County, and the cause of action, if any, arose in said district. This motion was overruled, and the circuit court of the Eastern District of Clay County proceeded to try the matter, and in pursuance of a verdict of the jury adjudged that the defendant was the father of the child, and should pay the sum of \$15 for lying-in expenses and three dollars per month for the support of the child.

By an act of the Legislature approved February 23, 1881, entitled "An act to establish separate courts in the county of Clay," it was provided that the county of Clay be divided into two judicial districts, to be called the Eastern District and the Western District; and therein the territory of said county comprising each of said districts was described. It provided that separate circuit, chancery and probate courts should be established in each of said districts. (Acts 1881, p. 21).

By section 3 of said act it was provided that "said circuit court of Clay County for the Western District shall have original and exclusive jurisdiction of all such cases as are now by law vested in the circuit courts of this State which have or may hereafter arise in said Western District. Provided, that no citizen or resident of said Eastern District shall be liable to be sued in said Western District, nor any citizen or resident of the Western District shall be liable to be sued in said Eastern District in any action whatever." By section 4 of the act it was provided that "the circuit court of the county of Clay, held at the county seat, shall have original and exclusive jurisdiction over the Eastern District." The act also provided that the circuit court for the Western District of said county should be held at Corning, which is located in said Western District, and that the circuit court for the Eastern District should be held at the county seat of said county, which is located in said Eastern District. The act made no provision, and assumed no power to make any provision, relative to the county court of said county; but by section 16 of said act it was provided "that, as to all matters not within the provisions of this act, the county of Clay shall be one entire and undivided county." And by section 5 of the act it was provided that, "in order to ascertain in which of the respective districts in said county actions in the circuit court shall be returnable and be tried, the said dis-

tricts for all the purposes of this act shall be considered as separate and distinct counties."

It will thus be seen that the place that had been established by law for the meeting of the Clay County Court prior to and after the passage of this act remained the same; and that was and continued to be at the county seat, which was and is located in the Eastern District of Clay County. A court has been defined to be a place where justice is judicially administered, and in order to constitute a court it must meet at the place that is appointed by law, and the judicial power of such court can be exercised only at such place. *Dunn v. State*, 2 Ark. 229; *Chaplin v. Holmes*, 27 Ark. 414; *Graham v. Parham*, 32 Ark. 676; *Neal v. Shinn*, 49 Ark. 227. So that the county court of Clay County could only exercise the judicial powers confided to its jurisdiction while sitting in the Eastern District of Clay County. The jurisdiction of the Clay County Court extends over the entire territory of Clay County, and by virtue of section 28 of art. 7 of the Constitution it has exclusive original jurisdiction in all matters relating to bastardy in said county, without regard to the district of the county in which the parties might reside or the child be born. Within the territory of the Eastern District of Clay County, therefore, the county court must exercise its original jurisdiction in bastardy matters, and in the exercise of that jurisdiction it takes no note of the districts into which the county is divided; but it has jurisdiction over all bastardy cases arising in any portion of Clay County. By section 489, Kirby's Digest, it is provided that "an appeal will lie from a judgment of the county court to the circuit court in all cases of bastardy, as in cases of appeal from judgments of justices of the peace to circuit courts."

It is to be presumed that a court will exercise no jurisdiction beyond its territorial limits, and so the circuit court of each county will not exercise jurisdiction over matters arising, or over inferior courts established, without the territorial limits of the county. And therefore appeals from the courts of justices of the peace and from county courts lie to the circuit court of the county in which such inferior courts are established and exercise the jurisdiction thereof. Kirby's Digest, § § 4665, 1310; *State v. Lancashire Ins. Co.*, 66 Ark. 466.

Now, by section 5 of this act it is provided that, in order to ascertain the respective jurisdictions of these two district circuit courts of Clay County, the said districts "shall be considered as separate and distinct counties." We conclude from this that appeals from all inferior courts in Clay County, including the county court, shall be taken to the circuit court in and for the district in which said court is established, and that this is the district in which is located the place where such inferior court is held and there exercises its jurisdiction.

It is urged that by section 3 of said act it is provided that the circuit court of Clay County for the Western District shall have original and exclusive jurisdiction of all cases which may arise in said Western District, and that the citizens resident in the Western District can be sued only in that district. But we think that this provision applies only to the original jurisdiction of that court and not to its appellate jurisdiction; and that the two district circuit courts would not have concurrent jurisdiction over such cases, but that such original jurisdiction in each district circuit court would be exclusive of the other.

It is urged that there is not sufficient evidence to sustain the verdict rendered herein; and in this connection it is suggested that the testimony of the prosecuting witness, the mother of the child, was not corroborated. But it has been held by this court that proceedings to affiliate a bastard child are of a civil nature, and that the jury may find that the accused is the father of the child upon the testimony of the mother alone. *Chambers v. State*, 45 Ark. 56; *Pearce v. State*, 55 Ark. 387; *State v. Blackburn*, 61 Ark. 407; *Wimberly v. State*, 90 Ark. 514; *Qualls v. State*, 92 Ark. 200.

We have examined the testimony introduced in this case, and we are of opinion that it is sufficient to sustain the verdict.

It is urged that the court erred in refusing to permit the introduction of testimony tending to prove acts of intercourse of the mother of the child with others than the defendant. But the court did permit the introduction of such testimony when confined to a period when in the course of nature the child could have been begotten; and testimony as to acts of intercourse had at other times was not admissible. 5 Cyc. 661. And it is not competent to impair the credit of a witness by proof of specific acts of immorality. *Ware v. State*, 91 Ark. 555.

It is urged that the verdict of the jury in fixing the amount of the lying-in expense at \$15 and payments for support at \$3 per month is not sustained by the evidence; and it is contended, in this connection, that no testimony was introduced showing the amount of the lying-in expenses that were incurred or of the amount that was necessary to support the child. The statute provides that if it is found that the defendant is the father of the child the court shall render judgment against him for the lying-in expenses for a sum not less than five dollars and not more than fifteen dollars, and also for a monthly sum of not less than one nor more than three dollars for the support of the child. Kirby's Digest, § 486. It will thus be seen that, although the lying-in expenses might be largely in excess of \$15, yet the court cannot adjudge a recovery for a greater sum than \$15 therefor; nor can it render a judgment for less than five dollars therefor, although the amount of the expenses thus incurred might be less than that sum. And this is likewise true as to the minimum and maximum amounts that can be adjudged for the monthly allowances. While, in determining the amount of these recoveries, it is proper to introduce evidence relative to the amount of the lying-in expenses that were actually incurred and as to the financial condition of the parties (*State v. Zeitler*, 35 Minn. 238; *Andrew G. v. Catherine A.*, 16 Fla. 830), yet the amount of the award that shall be made for those purposes must be confided largely to the discretion of the trial court. It is true that proceedings of this kind are held to be of a civil, rather than of a criminal, nature, and that the object of the statute is to obtain maintenance for the child, rather than punishment of the defendant, yet this court has held that the statute is also in the nature of a police regulation, and that the act of the putative father is regarded as an offense against the peace and good order of society. The statute has not named the sums recoverable as penalties, but it has fixed minimum and maximum amounts for such recoveries without necessarily regarding the amount of the actual expenses incurred or the sums required for the maintenance of the child. The statute has thus conferred upon the trial court great discretion in fixing these amounts in these proceedings. In the absence of all proof showing that the lower court has abused its dis-

cretion in this regard, we do not think it advisable to disturb its findings as to these amounts. 5 Cyc. 668; *Land v. State*, 84 Ark. 199; *Evarts v. Commonwealth*, 2 B. Mon. 55; *Dehler v. State*, 22 Ind. App. 385; *Rindskopf v. State*, 34 Wis. 217.

The judgment is affirmed.

RED BUD REALTY COMPANY v. SOUTH.

Opinion delivered July 11, 1910.

1. **CORPORATIONS—RIGHT OF MAJORITY OF STOCKHOLDERS TO CONTROL.**—The courts will not ordinarily interfere at the suit of a minority shareholder to control the discretion of the directors in management of the affairs of a corporation. (Page 291.)
2. **SAME—RIGHT OF STOCKHOLDER TO SUE FOR.**—Where the officers of a corporation fraudulently misappropriated the corporate funds, and the managing body refuses to seek relief against the wrongdoers, a stockholder may sue in his own name to secure the relief to which the corporation is entitled, and may make the corporation a party. (Page 291.)
3. **TRUSTS—FOLLOWING TRUST FUNDS.**—Whenever a trustee purchases property with trust funds, and takes the title thereto in his own name, equity regards such purchase as made for the benefit of the *cestui que trust*, who may elect whether he will take the property or recover from the trustee the funds thus wrongfully diverted. (Page 293.)
4. **SAME—WHEN DO NOT RESULT.**—A resulting trust did not arise where a trustee purchased property solely upon his own credit and subsequently paid for it with trust funds. (Page 294.)
5. **SAME—FOLLOWING TRUST FUNDS.**—The rule that property charged with a trust continues to be affected by the trust, though it be converted into a new form, has no application where an officer of a corporation borrowed money to purchase the shares of two stockholders in the corporation, and pledged such shares to secure the loan, and subsequently used funds of the corporation to pay such loan. (Page 295.)
6. **CORPORATIONS—LIEN UPON STOCK.**—A corporation whose funds are used by a stockholder to pay his own debts, for which his shares of stock had been deposited in pledge, has both a statutory and a contract lien therefor upon such shares. (Page 298.)
7. **TRUSTS—MINGLING TRUST WITH PRIVATE FUNDS.**—Where the chief officer and agent of a corporation mingled the corporate funds with his own, his dealings with such funds are narrowly scrutinized in equity; and, if he does not keep clear, distinct and accurate ac-

counts with proper vouchers, all presumptions are against him, and doubts are taken adversely to him. (Page 299.)

8. **SAME—WHEN EXPENSES OF TRUSTEE DISALLOWED.**—Where a trustee mingled his private business with the trust business, and incurred in his own business expenses of the same character as he sought to charge against the trust estate, it was not an abuse of discretion to disallow such expenses, if they were not satisfactorily established. (Page 299.)
9. **CORPORATION—VALIDITY OF STOCKHOLDERS' MEETING—NOTICE.**—A stockholders' meeting, of which absent stockholders had no proper notice, is illegal, and action then taken was not binding. (Page 300.)
10. **MASTER—CONCLUSIVENESS OF REPORT.**—The report and findings of a master appointed by the court upon its own motion are persuasive merely upon the chancellor, and not conclusive. (Page 300.)
11. **CORPORATION—RIGHT OF OFFICER TO COMPENSATION.**—The president of a corporation is not entitled to any compensation for performing the ordinary duties of his office unless a contract to that effect is either expressly or impliedly made with its governing body. (Page 301.)
12. **SAME—RIGHT OF OFFICER TO COMPENSATION.**—In determining whether an implied contract upon the part of a corporation exists to pay its president for services in its behalf, the nature of the corporation and of its business, the nature and extent of the services rendered, the comparative amount and value of the services of other officers of the corporation and all other circumstances of the case must be considered. (Page 301.)
13. **SAME—ACCOUNTING OF OFFICER—LIABILITY FOR INTEREST.**—Where the chief officer of a corporation, with the consent of its directors, acted as custodian of its funds and used a part of them in his own business, and deposited the remainder in a bank, he will be chargeable with interest only on so much of the funds as he used. (Page 302.)
14. **SAME—ADJUSTMENT OF CLAIMS OF STOCKHOLDERS—ALLOWANCE OF ATTORNEY'S FEES.**—Where the subject-matter of a suit involved the individual rights and interests of the stockholders of a corporation, as distinguished from those of the corporation itself, it was proper to make no allowance for attorney's fee to either party. (Page 303.)

Appeal from Baxter Chancery Court; *George T. Humphries*, Chancellor; reversed.

STATEMENT BY THE COURT.

This was an action instituted by one of the minority stockholders of a business corporation for the purpose of making one of its directors and officers account for the alleged misappropriation of its funds, and to declare him a trustee of certain property claimed to have been purchased by him with its money.

The Red Bud Realty Company was organized as a corporation under the laws of the State of Arkansas on the 13th day of May, 1903, with a capital stock of \$50,000, which was divided into two thousand shares of the par value of \$25 each. The original stockholders were J. C. South, Thomas Combs, T. J. McClean, H. Devereaux, W. V. Powell and Frank Tuttle, each of whom was the owner of four hundred shares of said capital stock except W. V. Powell, who was the owner of 399 shares and Frank Tuttle, who was the owner of one share. The general nature of the business of the corporation consisted in purchasing, selling and dealing in real estate. The principal, and in fact the only, asset of the corporation at its organization was a tract of land situated in Baxter County, Arkansas. The White River branch of the St. Louis, Iron Mountain & Southern Railway Company was being built at this time through Baxter and other counties of north Arkansas, and this tract of land was located upon its line of railroad. The purpose of the incorporators was to establish a town site upon this tract of land and dispose of the lots into which it would be divided. In pursuance of that object, the land was laid out into lots and blocks, and the town of Cotter was established thereon, and the place of business of the corporation was located at that town. At its organization, W. V. Powell was elected president, J. C. South was elected secretary, and Thomas Combs treasurer, of the corporation, and by a resolution of the board of directors Combs was employed to manage the affairs of the company and make sale of the lots, and for his services it was stipulated that he was to receive a stated monthly salary. He at once established the office of the corporation at Cotter, and during the years 1903 and 1904 he sold a great number of lots and collected the purchase money therefor.

In May, 1904, W. V. Powell purchased from T. J. McClean and H. Devereaux their stock in the corporation, and thereby became in effect the owner of three-fifths of the shares of its capital stock. Later in the year he stated to South and Combs, the remaining shareholders, that he was impatient at and dissatisfied with the slowness of the sale of the lots, and proposed that the lots should be sold on what is commonly called the "drawing plan." He proposed that each lot should be sold at the price of \$50, and that he would select agents who would

make the sales upon a commission. At that time Powell was a resident of St. Louis, Missouri, and he proposed that he would carry out this plan for the sale of the lots from that place. At first South and Combs demurred to this proposal, but finally passively acquiesced in the plan. Thereupon, Powell selected agents and proceeded with his proposed scheme of making sale of the lots, and in this manner sold something in excess of eight hundred lots during 1904 and 1905. On November 23, 1905, the lots were awarded to the purchasers by a drawing held at Cotter. From time to time, and up to November 23, 1905, Powell collected the purchase money of these lots, which amounted in the aggregate to something in excess of \$40,000.

In April, 1905, Powell claimed that he sold four hundred shares of the stock of the corporation to R. X. DeGraw, and that in June, 1905, he sold four hundred shares to L. L. Doyle, and soon thereafter told South and Combs of these sales. The transfer of these shares of stock was never entered on the books of the company, and certificates of the transfer were never filed with the proper public official; but in October and November, 1905, both DeGraw and Doyle met with Powell, South and Combs at Cotter and participated with them at meetings when the business of the corporation was discussed and transacted. It is claimed by Powell, DeGraw and Doyle that the latter gentlemen were duly elected directors of the corporation at one of these meetings, but this is denied by South and Combs. The minutes of the proceedings of the board of directors were very imperfectly kept; the meetings were very irregular, and conducted very informally. The testimony, however, tends to prove that South and Combs recognized these two as owners of shares of the stock, if not as directors. No annual meeting of the stockholders of this corporation was ever called or held from its organization until in October, 1906, when such a meeting was attempted to be held at Little Rock, Arkansas.

About the time of, and frequently after, the drawing and awarding of the lots, which was had upon November 23, 1905, both South and Combs requested Powell to make an accounting of the funds received by him for the lots. He claimed, as a reason for postponing the accounting, that there were certain expenses which were not liquidated, and others that might probably

be incurred, and also objected to paying the money over to Combs, the treasurer, because the bank at Cotter was insecure to keep such large funds. Upon their becoming more insistent for a settlement, he paid to Combs \$2,000 and to South \$1,000, but still failed to make an accounting.

In September, 1906, as president of the corporation, Powell called a special meeting of the stockholders, to be held at Little Rock, Arkansas, on October 15, 1906. He testified that he mailed notices of the meeting to each of the shareholders, but South claimed that he never did receive such notice. On the stated day all the shareholders except South met at Little Rock, Arkansas; and held an alleged stockholders' meeting of the corporation. They reduced the number of directors from five to four, and elected Powell, Combs, DeGraw and Doyle directors, and changed the place of business of the corporation from Cotter, in Baxter County, to Roe in Monroe County. These alleged directors then met on the same day at the same place, and elected Combs president, Powell vice-president and Doyle secretary and treasurer of the company. At this meeting Powell presented an account of the collections and disbursements made by him of the purchase money of the lots which had been sold through his agency. This account, without reference and without investigation, was immediately approved. A dividend was then declared which Powell claimed disposed substantially of all the funds of the corporation. He claimed that the funds in the hands of Combs were sufficient to pay the amount of the dividends payable to South and Combs, and that he would pay out of the funds in his hands the dividends payable to himself, DeGraw and Doyle. He also claimed that this left in his hands a balance of \$659.20 a part of which he disbursed in paying the expenses of the shareholders in attending the above meeting, and subsequently he paid the remainder as a retainer fee to his attorney in defending this suit.

On November 30, 1906, J. C. South as sole plaintiff instituted this suit in the Baxter Chancery Court, making W. V. Powell, L. L. Doyle, R. X. DeGraw, Thomas Combs and the Red Bud Realty Company parties thereto. In his complaint, amongst other things, he alleged that Powell was attempting to fraudulently appropriate to his own use funds of the corpora-

tion, and had wrongfully misappropriated same; that the statement made by him of expenditures was false, and was for the purpose of depriving the other shareholders of the assets of the company; that Doyle was a brother-in-law, and DeGraw was a business associate and close friend of Powell, and that they did not actually own any of the stock of the corporation, but were merely representatives and dummies of Powell; that Powell, by thus controlling the majority of the stock and the affairs of the corporation, was misappropriating its funds to the injury of the minority shareholders. Subsequently, he alleged in an amended complaint that Powell had purchased the shares of stock from McClean and Devereaux (amounting to eight hundred shares) with money of the corporation, and on this account the purchase of said shares resulted to the benefit of the corporation, and that it became thereby the equitable owner of the shares. He also alleged that Powell had deposited with Combs these certificates of stock, and also the stock which had been issued to him, in order to secure the payment of all indebtedness due by him to the corporation. He asked that the parties be restrained from disposing of any of the above shares of stock; that Powell be required to account for all funds of the corporation, and that a lien be declared upon the shares of stock deposited with Combs for the payment of the amount due by him; and, finally, that the affairs of the corporation be wound up and its assets distributed amongst its shareholders according to their respective interests.

Subsequently, Combs aligned himself as a party plaintiff in the suit, and adopted as his own the complaint of South. The other defendants interposed a demurrer to the complaint, which was overruled. They then made answer thereto, in which they denied the various allegations of the complaint, and in substance alleged that the affairs of the corporation had been properly conducted, and that Powell had correctly and honestly accounted for all its funds which he had received.

When the original complaint was filed, a temporary injunction was issued in accordance with its prayer, and was continued in force by the lower court. Thereafter, the chancellor appointed receivers to take charge of the assets of the corporation, which then consisted of some unsold real estate, office fixtures and notes. Subsequently the chancery court upon its own motion

appointed a master, with directions to take testimony relative to all lots sold by Combs and all collections and disbursements made by him; also relative to all lots sold through the agency of Powell, and to all collections and disbursements made by him; and to state an account between each of them and the company. The master was also directed to state the payments that had been made to each of the shareholders and to state the account of each of them with the company.

The master took testimony in pursuance of said order, and made a report in compliance with its directions. In regard to the collections and disbursements of the funds of the corporation made by Powell, he reported that Powell had collected funds belonging to the corporation amounting to \$41,650.25. In effect, he reported that he did not pass upon the correctness of the items of expense, salary, etc., which were presented by Powell in his account, but stated that an account of these expenses, etc., had been presented at the alleged meeting of the board of directors at Little Rock on October 15, 1906, and by that body approved, and that the legality of that meeting was questioned. He found that the following were the total items of expenses, etc., which were presented to that meeting:

Expenses of advertising and of stockholders, and com-	
missions of agents.....	\$17,855.74
Amounts refunded to purchasers of lots.....	1,385.00
Salary as superintendent, W. V. Powell.....	1,500.00
Expenses of W. V. Powell.....	1,000.00

Making a total of expenses, etc.....\$21,740.74

And leaving a balance to be accounted for by

Powell of\$19,909.51

He also found that out of this balance Powell had theretofore paid to South \$1,120 and to Combs \$2,020.

In view of our determination of the issues and matters involved in the case, we do not deem it necessary to further detail the statement made by the master. Exceptions were filed to the report by all the parties.

The chancery court, without formally passing on the master's report, examined all the testimony and made findings of its own. It found that at the organization of the Red Bud Realty

Company J. C. South and Thomas Combs became each the owners of four hundred shares of its capital stock, and that Powell became the owner of 399 shares and that each of these parties is now the owner respectively of those shares. It found that Powell had purchased the shares of stock of Devereaux and McClean with the funds of the corporation, and upon said purchase the stock became the property of the Red Bud Realty Company in the hands of Powell as trustee only; that DeGraw and Doyle were in fact only the representatives of Powell, and were not *bona fide* purchasers of the said stock. It declared that these shares were the property of the corporation, and that as a result South, Combs and Powell were in effect the owners of one-third each of its assets. It also found that the stockholders' and directors' meetings which were held in Little Rock, Ark., in October, 1906, were without authority of law, and that the proceedings of these meetings and the actions there taken were illegal and void. It found that the articles of incorporation of the company provided that the place of business of the corporation was located at Cotter, Ark., until some other place should be selected by its board of directors, and that the directors had never selected any other place, and on this account that such meetings could only be held at Cotter; also that, according to the by-laws of the company, the annual meeting of its stockholders was fixed for May 13 of each year, and that this time had never been changed by the board of directors; also that legal notice had not been given of said meetings; and for these various reasons it held that said meetings were illegal. It further found that the account made by Powell of his expenses and expenditures was wholly unsustained by proper and satisfactory testimony, and for this reason it disregarded same. It found from the evidence that Powell was entitled to a credit of \$15 per lot for all expenses and expenditures made by him in the sale thereof, making a total of \$12,120; and that he was also entitled to a credit of \$1,385 for cash refunded on lots, and of \$676.46 for cash paid for supplies. It also allowed him a credit of \$4,982 for the amount paid by him for the McClean and Devereaux stocks. It approved the finding of the master that Powell had collected funds belonging to the corporation amounting to \$41,650.25, but charged him with the further sum of \$600 on account of dividends which he had collected on the Devereaux

and McClean stocks and which it found belonged to the company. It thus found a net balance due from Powell to the company of \$23,086.79; that out of this fund Powell had paid to Combs \$2,020, and to South \$1,120, thus leaving a net balance of \$19,946.79, due by Powell to the corporation.

The lower court in effect approved the findings of the master relative to the account of Thomas Combs. It found that he had collected \$20,063.82, and had disbursed for expenses, for purchase money of the original land, etc., \$12,409.96, leaving a balance of \$7,632.86 for the company; that of this balance he had paid in dividends the following: To Powell \$900, to South \$3,040 and to himself \$300, thus leaving a net balance of \$3,413.86 due by him to the corporation.

The court then found that South, Combs and Powell were each the owners of and entitled to one-third of the net sums due by Powell and Combs to the company, less the amounts which had been respectively received by them, and stated the account if each of them with the company accordingly.

From this decree defendants Powell, Doyle and DeGraw have appealed to this court.

Manning & Emerson, for appellants.

The necessity of a meeting of the board of directors for the transaction of the business of the corporation may be waived by the stockholders. 89 Ark. 446. A corporation is liable for the acts of its agents. 7 Cranch 299; 8 Conn. 191; 27 Conn. 853; 39 Ill. 609; 4 Allen 20. A contract to pay the officers for services as such may be implied. 6 Ark. 292; 151 Mass. 433; 13 Col. 4; 45 Ga. 34; Helliwell on Stockholders, 483; 74 Mich. 226; 36 La. Ann. 138; 14 Hun 483; 37 Miss. 202; 53 N. E. 232; 50 So. 658. A master's findings, based on conflicting testimony, will not be disturbed. 125 U. S. 136; 144 *Id.* 104; 129 *Id.* 512; 31 Fed. 246; 23 Pac. 671; 15 S. E. 253; 53 Me. 214; 23 N. J. Eq. 495. The findings of a chancellor are persuasive. 43 Ark. 307; 50 Ark. 185; 55 Ark. 112; 75 Ark. 75. But a master's findings are as conclusive as the verdict of a jury. 74 Ark. 336. The presumption that a person to whom a letter was addressed and mailed received it is rebuttable. 73 Ark. 194; 74 Ark. 18. The trust must have been coeval with the deed, or it cannot exist at all. 2 Jones, Ch. 405; 47 Ark. 358. The evi-

dence that the purchase was made with trust funds must be clear. 2 Pom. Eq. 623; 75 Ark. 451. An innocent purchaser will be protected. 4 Ark. 301.

Z. M. Horton, Allyn Smith and McCaleb & Reeder, for appellees.

Unless the transcript shows that it contains all the evidence in the case, the court will presume that there was sufficient evidence to support the findings of the chancellor. 70 Ark. 127; 72 Ark. 21; 77 Ark. 195; 38 Ark. 477; 36 Ark. 484; 67 Ark. 287. The burden is upon appellant to show that the finding of the chancellor was clearly against the weight of the evidence. 24 Ark. 431; 44 Ark. 216; 67 Ark. 287; 68 Ark. 314; *Id.* 134; 77 Ark. 305. The complaint states a cause of action for equitable relief. 17 L. R. A. 412; 93 Mich. 97; 52 N. W. 218; 21 Pac. 1133; 18 How. 331; 12 Blatch, 280; 104 Mass. 378; 6 Allen 52; 40 N. H. 567; 11 Ch. Div. 97; L. R. 5 Eq. 464; 27 Fed. 625; 26 Conn. 456; 24 Me. 9; L. R. 2 Ch. App. 737; 4 Hare 49; 18 How. 480; 18 Ark. 338; 8 Blatch. 347; 41 Ga. 454; 38 N. W. 772; 7 So. 108; *Id.* 398; 88 Ky. 54; 16 So. 6; 42 N. E. 851; 159 Ill. 489; 15 S. W. 1094; 24 Atl. 499; 52 Fed. 611; 11 So. 344; 90 Hun 254; 72 Fed. 591; 40 N. Y. S. 1042; 9 L. R. A. 527; 31 So. 683; 77 N. Y. S. 898; 91 Fed. 311; 33 Atl. 889; 167 Fed. 619; 76 N. Y. S. 712; 47 Atl. 877. No demand was necessary. 8 Blatch. 347; 38 N. W. 772; 47 N. W. 361; 21 Pac. 1188. An attempt to vote unlawful salaries to the officers is an additional ground for equitable interference. 56 N. Y. S. 807; 22 Fed. 883; 73 N. Y. S. 403; 64 Fed. 253; 27 Conn. 170; 68 Ill. 570; 37 N. Y. 317; 18 Ark. 341. A party waives the error in the admission of incompetent testimony by resorting to testimony of the same kind. 66 Ark. 588; *Id.* 292; 67 Ark. 47; *Id.* 531. The decree is sustained by the evidence. 6 L. R. A. 429; 125 N. C. 380; 26 L. R. A. 681; 39 Kan. 230; 9 Kan. 97; 74 Ark. 339; 76 Ark. 339. Powell was a trustee. 5 L. R. A. 363; 66 *Id.* 261; 2 *Id.* 534; 88 U. S. 616; 57 S. E. 242; 68 Ark. 542; 49 Ark. 242; 40 Ark. 393. A purchaser of stock can take no greater interest than the seller has to convey. 60 Ark. 204. The meeting of the directors held in Little Rock was void. 54 Ark. 58; 55 Ark. 473.

FRAUENTHAL, J. (after stating the facts). 1. This was an action instituted by one of the minority shareholders of a corporation to recover in part assets not belonging directly to such shareholders, but in effect to recover assets belonging to the corporation itself.

A stockholder does not acquire any estate in the property of a corporation by virtue of his stock; the full legal and equitable title thereto is in the corporation, and a cause of action for the recovery of its property or for a violation of its rights thereto is in the corporation. The management and control of the affairs of a corporation rest with its board of directors, and the general rule is that courts will not ordinarily interfere at the suit of a minority shareholder to override and control the discretion of the directors in the management of the business and affairs of the corporation. The majority of the stockholders ordinarily have the right to conduct and control its affairs and property.

It is urged by counsel for defendants that the cause of action, if any, set out in the complaint is that solely of the corporation; and, inasmuch as appellants represent the majority of its stock, they have the right to manage its affairs and, within their own discretion, to determine all questions relative to the corporate property and management; that therefore they have the right to make settlements with those who have business relations with it, and cannot be compelled to litigate where they do not consider it advisable or just to do so. On this account, they insist that the demurrer to the complaint should have been sustained.

But, while the directors of a corporation have the management of its business and property, nevertheless they also occupy a relation of trust with reference to its stockholders. The stockholders own the shares, whose value is dependent upon and is affected by the conduct of the directors, and therefore the directors owe certain fiduciary duties to the stockholders. The cause of action primarily exists in the corporation for the recovery of its assets and for the violation of its rights to same. But where the directors are guilty of breaches of trust in their management of the affairs of the company, and through fraud or gross negligence refuse, or virtually refuse, to institute an action for the recovery of its property wrongfully diverted or

of its funds misappropriated, then a stockholder has a right to maintain in equity such an action to secure those rights and prevent a failure of justice. This right of action arises to the shareholder whenever the directors and officers of the corporation are pursuing a course for their own personal gain and in fraud of the rights of the shareholders.

In the case of *Hawes v. Oakland*, 104 U. S. 450, in speaking of the right of a shareholder to institute a suit relative to corporate property in his own name, the court says: "We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit * * * such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders."

And, as is said in the case of *Miner v. Belle Isle Ice Co.*, 17 L. R. A. 412, "there is no doubt of the power of a court of equity, in case of fraud, abuse of trust, or misappropriation of corporate funds, at the instance of a single stockholder, to grant relief, and compel a restitution; and where the holders of the majority of the stock control the directorate, and are themselves the wrongdoers, without any showing that the directors have been requested, or the corporation has refused, to act." 3 Pomeroy, Eq. Jur. § 1095; Ex parte *Booker*, 18 Ark. 338; *Dodge v. Woolsey*, 18 How. 331; *Hand v. Dexter*, 41 Ga. 454; *Marcuse v. Gullett Gin Co.*, 52 La. Ann. 1383; *Brewer v. Boston Theater*, 104 Mass. 378.

Where, therefore, the officers of a corporation fraudulently misappropriate the corporate funds in any manner, and its managing body refuses, or in effect refuses, to seek relief against the wrongdoers, a single stockholder may institute a proceeding in his own name to secure the relief to which the corporation is entitled; and in such suit he should make the corporation a party. We think that the complaint in this case made sufficient allegations to invoke the aid of a court of equity at the instance of one of the minority stockholders of the corporation.

2. The chancellor found that Powell, one of the directors, and the chief officer of the corporation, had misappropriated the funds of the corporation and had used same in payment for the Devereaux and McClean stocks, which he purchased. He declared that a trust thus resulted in favor of the corporation which a court of equity would enforce, and that thereby the corporation became the equitable owner of the stock so acquired.

It is well settled that whenever a trustee purchases property with trust funds, and takes the title thereto in his own name, equity will regard such purchase as made for the benefit of the *cestui que trust*. In passing upon this question, the Supreme Court of the United States in the case of *National Bank v. Insurance Company*, 104 U. S. 54, said: "The master of the Rolls, Sir George Jessel, showed that the modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them * * *; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account." By this doctrine equity maintains the beneficial rights of property, and where a trustee uses trust funds in the acquisition of property, the *cestui que trust* may elect whether he will take the property or recover from the trustee the funds thus wrongfully diverted. 3 Pomeroy, Eq. Jur. § 1049; *Green v. Green*, 46 L. R. A. 525; *Holmes v. Gilman*, 138 N. Y. 369; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357; *Dyer v. Dyer*, 1 White & Tudor, Lead. Cas. in Eq. 314.

But, in order to constitute such a resulting trust, the payment of the purchase money must be made before or at the time of the acquisition of the property; a subsequent payment will not by relation attach the trust to the original purchase. In the case of *Botsford v. Burr*, 2 Johnson's Ch. (N. Y.) 415, Chancellor Kent said: "The trust must have been coeval with the deeds, or it cannot exist at all. * * * The trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money and on no other ground. It cannot be mingled with any sub-

sequent dealings whatever." *Rogers v. Murray*, 3 Paige, Ch., 390; *Dyer v. Dyer*, *supra*.

Following this doctrine, this court in the case of *Sale v. McLean*, 29 Ark. 612, said: "The law is, 'that if a purchase of property be made, and the deed is taken in the name of one party, whilst the consideration is given or paid by another, a resulting trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.' * * * The purchase money must be paid or secured by another at the same time or previously, and as part of one transaction. * * * The trust must immediately arise by virtue of the purchase. * * * If no trust was created at the time of the purchase, none can arise afterwards, because the rights of the parties must of necessity become then fixed."

And in *DuVal v. Marshall*, 30 Ark. 230, it is held that, in order to create a resulting trust in favor of one who pays the purchase money for property bought in the name of another, the payment must be contemporaneous with the purchase.

In the case of *Milner v. Freeman*, 40 Ark. 62, this court further said: "It is impossible to raise a resulting trust so as to divest the legal estate of the grantee or his heirs by the subsequent application of the funds of a third person to the satisfaction of the unpaid purchase money." *Humphreys v. Butler*, 51 Ark. 351.

In the case at bar the undisputed testimony shows that Powell purchased from McClean and Devereaux their stock in the corporation in May, 1904. He borrowed the money with which to pay for this stock from the Central National Bank of Carthage, Missouri, and executed to that bank his note therefor with personal security, and also attached thereto as a pledge the stock thus purchased. When that note matured, he borrowed the same amount from the Bank of Aurora, of Aurora, Missouri, and with the proceeds paid the note. He then executed to the Bank of Aurora three notes for the money thus loaned to him, as follows: \$1,500 maturing February 25, 1905; \$1,500 maturing March 25, 1905; \$2,200 maturing April 18, 1905. The evidence tended to prove, and the chancellor so found, that when these notes matured Powell paid them with funds in his hands

which belonged to the Red Bud Realty Company. In fact, the evidence proved that he gave checks of the Red Bud Realty Company upon the funds of that corporation, on deposit in the Missouri-Lincoln Trust Company of St. Louis, Missouri, to pay these notes severally on the dates of their maturity. Without detailing this testimony, we think that it abundantly sustains the chancellor in his finding that Powell thus used the money of the Red Bud Realty Company with which to pay these notes. But the evidence as conclusively establishes the fact that he did not use the money of the Red Bud Realty Company at the time he purchased the stock, but that he acquired and purchased the shares, long before he used the funds of the corporation, with money which he obtained upon his own credit. The purchase of the shares and the taking of the money of the corporation were not coeval, and were not one transaction. The money of the corporation was used long after the purchase; and, while it did go to pay the notes of Powell, it was in fact in no way connected with the transaction of the purchase of the shares. Powell had the right to purchase the stock from the shareholders of the company for his individual benefit; and, although a director and officer of the corporation, he violated no trust when he did so. Nor do we think that the testimony warrants any finding that Powell, at the time he made the purchase, contemplated paying for these shares of stock with funds belonging to the corporation. At the time he made the purchase he was not the treasurer of the corporation, nor did he have any moneys of the corporation in his hands. He made the purchase openly, and the appellees, who were the other shareholders of the corporation, knew of his purchase of these shares of stock many months before he made a suggestion of managing the sale of lots, and recognized his ownership thereof. He purchased the stock with money of his own, secured in the ordinary and usual course of business. He pledged the 399 shares of stock owned by himself from the time of the creation of the corporation, and also gave a perfectly solvent individual as surety on his note to obtain the money, as well as pledging the shares thus purchased. He was engaged in other business, and had other property at the time, and was perfectly solvent. At the time he used the money of the corporation there was

really due from the corporation to Powell, for the expenditures which he had made for the expenses of the sale of the lots and for his interest in the net proceeds of such sales, as a shareholder (which was substantially an one-fifth interest), an amount largely in excess of the money of the corporation which he used to pay his individual debts. We cannot say from the testimony or from the circumstances of this case that he did not act in good faith when he purchased the stock from McClean and Devereaux, or that he contemplated at that time paying therefor with money which he would subsequently obtain wrongfully from the corporation.

But counsel for appellee urge that when Powell misappropriated the funds of the corporation in February and March, 1905, and with such funds paid the notes which he had given to the Bank of Aurora, a constructive trust in favor of the corporation was impressed upon the shares of stock which Powell had purchased, because the stock was but the product or substitute for the funds of the corporation. They invoke the rule in equity that all property charged with a trust continues subject to and affected by the trust, however much it may be altered or changed in its nature or character. This is a well established doctrine of equity. Courts of equity will protect the rights in property taken by a wrongdoer, and will follow it through whatsoever changes and transmutations it may undergo in his hands. As is said by Prof. Pomeroy: "Whenever one person has wrongfully taken the property of another and converted it into a new form, the trust arises and follows the property or its proceeds." 3 Pom. Eq. Jur. § 1051.

The reason of the doctrine is stated by Lord Ellenborough in the case of *Taylor v. Plumer*, 3 Maule & S. 562, in language that has been often quoted: "For the product or substance for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail."

But, before such a trust arises, it is essential that the fund thus wrongfully appropriated and converted be traced to the acquisition of the new species of property or investment upon which it is sought to impress the trust. The misappropriated funds must be traced to and located in the changed form or

species of property. It can not be pursued and located in the general mass of the wrongdoer's property because such wrongdoer has incurred indebtedness generally in the acquisition of the general mass of his property and has subsequently applied the misappropriated funds to the payment of his debts generally.

In the present case Powell simply owed the Bank of Aurora for money which he had borrowed, and to secure the payment of that loan he had pledged the McClean and Devereaux stocks and other stock. It was the same as if he had given to the bank a mortgage upon land or other property owned by him to secure the debt due by him to the bank. When this debt to the bank matured, he used the funds of the corporation with which to pay that indebtedness. The funds of the corporation thus passed to the bank to pay the debt due to it. The funds were not converted into the stocks. Nor can it be said that the funds are traced to or located in the stocks any more than it can be said that they can be traced to and located in any other property then owned by Powell, or to any other property owned by him and pledged for the debt of this bank. The moneys of the corporation only went to discharge the debt that he owed. To the extent that the funds of the corporation wrongfully taken discharged a lien upon property owned by Powell equity would impress upon such property still in the hands of Powell a lien for its repayment.

We are cited to the case of *Atkinson v. Ward*, 47 Ark. 533, to sustain the contention of appellees. But we do not think that the decision in that case is different from our present holding. In that case the trustee, Ward, had acquired a lot with money owned by him, and later had erected a storehouse upon the lot with money entrusted to him by Atkinson & Company. It was there held that the improvements upon the lot were acquired with the funds of Atkinson & Company, which Ward had wrongfully used, and that the amount of the funds of Atkinson & Company used in the making of said improvements should be declared a lien on the premises. In that case it was said: "But in the case in hand a trustee diverts the trust fund from its proper channel and converts it into a house on his own land. The fund has been followed and definitely located there." And the court impressed a lien thereon for the amount of the funds so taken. It did not declare the *cestuis que trust* (Atkinson & Com-

pany) the equitable owners of the premises. And to the same effect is the case of *Dyer v. Jacoway*, 42 Ark. 186.

And so in the case in hand the corporation has a lien in equity upon the shares of stock which Powell pledged to the Bank of Aurora to secure his debt to it, because Powell used the money of the corporation wrongfully and applied it to the discharge of that debt and of the lien on that property. Powell, however, did not with the funds of the corporation acquire these shares of stock, nor have these funds been converted into these shares or into any property that has been transmuted into these shares. It follows that these shares of stock did not in equity become the property of the corporation. The corporation has only a lien thereon to the extent of the debt secured thereby which was discharged with its funds. But it is not necessary in this case to impress upon the shares of stock which were pledged to the Bank of Aurora a lien in favor of the corporation for the repayment of the money of the corporation which Powell used to discharge said debt to the bank and the lien on these shares of stock, by way of this equitable construction. Powell is answerable for all funds of the corporation which he collected and must account therefor; and for his indebtedness to the corporation the statute gives to the corporation a lien on the stock in his own name, and as will be seen hereafter the stock acquired from McClean and Devereaux was pledged to the corporation to secure all such indebtedness; so that the corporation had a lien thereon for all indebtedness due to it by Powell, including any funds he misappropriated.

3. The chancellor found that Powell's account of his expenses and expenditures was not supported by proper and satisfactory testimony; that his dealings with, and misappropriation of, the funds entrusted to his charge tainted his account with such suspicion that he disregarded it, and thereupon determined, from the other testimony in the case, the amount that should be justly and equitably allowed him for said expenses incurred and expenditures paid out by him for the corporation. We can not say that this finding of the chancellor is contrary to the clear preponderance of the testimony. Powell occupied a position of trust with reference to the corporation, and also a fiduciary relation to its shareholders. He was its chief officer

and, as its agent, had collected large sums for it. These he mingled with his own funds, he says himself; and the chancellor has found (and we think his finding is sustained by the evidence) that he used the money of the corporation in order to pay his own debts.

In the case of *McNeil v. Gates*, 41 Ark. 264, it is said: "The dealings of a trustee with the trust property are narrowly scrutinized by courts of equity. If impugned, they cannot stand unless characterized by the utmost good faith and candor. And the burden is upon the trustee to show their entire fairness." Where the duty of the trustee or agent requires it, he must keep true, regular and accurate accounts of all his transactions, both of receipts and disbursements, and should render a full and complete statement, supported by proper vouchers. As is said in the case of *Landis v. Scott*, 32 Pa. St. 495: "If he does not, every presumption of fact is against him. He cannot impose upon his principal, or *cestui que trust*, the obligation to prove that he has actually received what he might have received," or that he has not expended what he claims to have paid out. If he does not keep clear, distinct and accurate accounts, with proper vouchers, "all presumptions are against him, and doubts are taken adversely to him." 2 Perry on Trusts, § 821; 28 Am. & Eng. Ency. Law, p. 1095; *Gale v. New York Hay Co.* 66 N. Y. Supp. 291; *East v. Key*, 84 Ark. 429.

The expenses and expenditures for which Powell seeks credit were incurred, he claims, in making the sale of the lots. The items that he names are expenses of maintaining an office and the payments made by him for advertising and to agents. He was at the time engaged also in the management of an individual business of his own in which he maintained an office and incurred the same character of expenses for which he asks reimbursement from this corporation. The testimony tends to prove that he mingled his own affairs and business with those of the company, and we do not think that the court abused its discretion in finding that his accounts of these expenses were surrounded with doubt, and therefore were not satisfactorily established.

He did not present proper and competent vouchers of his expenses for the payments claimed to have been made to agents and for advertising. He claims that the original books and ac-

counts were accidentally destroyed by fire, and on this account were not produced; but we cannot say from the testimony that the chancellor clearly erred when he disregarded his account and allowed him all these expenses and expenditures upon the basis of \$15 per lot. The testimony tends to prove that Powell stated that the lots could be sold upon the plan which he suggested for \$5 commission to agents per lot and \$5 per lot for advertising, or at most for \$15 per lot for commissions and expenses. The chancellor allowed him for his expenses and expenditures this largest amount.

It is urged that this account was presented to the board of directors of the corporation at the meeting held in October, 1906, at Little Rock and by it was approved; that the discretion and right to approve the account was within the power of the managing body of the corporation, and its action should, therefore, be conclusive upon the court. But the chancellor found that the meeting of the alleged directors, and also the meeting of the stockholders at that time and place, were illegal, and the proceedings then had void. From the findings of the chancellor as to the provisions of the articles of incorporation and by-laws of this company, and that proper notice was not given of these meetings, we think the chancellor was correct in his conclusion in holding that the meetings were not legally held, and that the actions there taken were not binding. 1 *Thompson on Corporations*, § § 689-709-710; 10 *Cyc.* 321; *Simon v. Sevier Ass'n*, 54 Ark. 58.

It is also urged that the master made a finding approving these items of the account, and that his finding should not be disturbed; but we do not so understand the report of the master. He only reported that the account was presented to and approved by this alleged board of directors at said meeting in Little Rock. He does not state that he had himself examined the various items of the account, or that he had taken any testimony relative to the items thereof other than the account itself which was filed by Powell; nor does he state that he finds that these items of the account are correct, and that they should be allowed. The report and findings of a master appointed by the court of its own motion, however, are not conclusive upon the chancellor. They are only advisory. While they are highly persuasive, and should not be lightly disregarded, the chancery court has the

power, and it is its duty, to pass its own judgment upon the findings of the master in the light of the evidence adduced. *Claypool v. Johnston*, 91 Ark. 549; *Carr v. Fair*, 92 Ark. 359. And the findings made by the chancery court upon matters submitted to a master appointed by it upon its own motion will be sustained upon appeal in this court if they are not against the preponderance of the evidence. *Claypool v. Johnston*, *supra*.

4. It is urged by counsel for Powell that he was entitled to compensation for services rendered by him relative to the sale of the lots which were made through his agency. For these services he asked for an allowance of \$1,500, and the chancellor refused to allow him any compensation therefor. Under the testimony adduced in the case, we cannot say that the chancellor erred in this ruling. Powell was the president of the corporation, and one of its chief stockholders. The company was a joint enterprise for the promotion of the sale of the lots of a townsite, which was the sole asset of the corporation. All the members of the company were engaged in advancing the enterprise, and none of them received compensation for such acts or services.

The president of a corporation is not entitled to any compensation for performing the ordinary duties of his office unless a contract to that effect is made with him by its governing body. A contract may, however, be implied on the part of the corporation to pay its president for special services rendered outside of the ordinary duties of the office. The question whether or not there was an implied contract to this effect is one of fact, rather than of law. In considering whether or not such a contract has been proved, the nature of the corporation and its business, the nature and extent of the services rendered, the comparative amount and value of the services of other officers of the corporation, and all other circumstances of the case, must necessarily be looked at and weighed, and it must also be considered whether or not the services were performed under circumstances showing that it was understood by the proper officials of the corporation and by the officer rendering the services that they were to be paid for. 7 Thompson on Corporations, § § 8581, 8582; 21 Am. & Eng. Ency. Law, p. 909; 10 Cyc. 322; *Bartlett v. Mystic River Corporation*, 151 Mass. 433; *Corinne Mill Canal & Stock Co. v. Toponce*, 152 U. S. 405.

In the case at bar there were only a few members of the corporation, and all of them were its officers. All of them were rendering some character of service and doing some act to advance and promote the enterprise owned by the company. Some of the officers other than Powell rendered valuable services for the corporation, and asked and received no compensation therefor. It rather appears from the testimony and circumstances that no officer was expected to charge or receive any compensation for such services. The services rendered by Powell consisted in superintending the agents selected by him to make the sale of the lots. The testimony tends to prove that the officers of the corporation understood that all the expenses incident to making the sale of the lots under the plan suggested by Powell were to be paid on the commission basis, and that there would be no extra compensation paid to any officer for any services rendered in promoting or making the sale. The amount of the commission he was allowed by the chancellor for these expenses aggregated thirty per cent. of the gross proceeds of the sales, and, as found by the chancellor (which finding is sustained by the evidence), this was reasonably sufficient to pay for all expenses, expenditures and services in making said sales. Under these circumstances, we cannot say that the lower court erred in finding that there was no implied contract to pay Powell for his alleged services. The finding of the chancellor relative thereto should, therefore, not be disturbed.

5. In his findings the chancellor charged Powell with interest upon the final balance, which it decided was due by him, from November 23, 1905, the day upon which the lots were sold under the plan proposed by him. In this ruling we think that the chancellor was in error. The sale of the lots and the collection of the purchase money therefor by Powell was made with the consent and concurrence of all the directors. Although he was not the treasurer of the company, nevertheless the other directors of the corporation acquiesced in his being the custodian of these funds, and in his keeping them on deposit in a bank in St. Louis, which he did. He would not be chargeable with interest on funds which he was only holding as custodian thereof. There is no testimony that he used any of these funds, except the amount appropriated by him in payment of his notes to the Bank of Aurora. For the money of the company so used

by him he should be charged with interest, and for none other. 1 Perry on Trusts, § 468; 31 Cyc. 147; *Hinckley v. Rd. Co.*, 100 U. S. 153; *Howard v. Manning*, 65 Ark. 122. And he should be charged with interest on the funds so used by him only up to the time when he in effect replaced them, which could not be later than October, 1906. In October, 1906, Powell presented his account of all collections and disbursements made by him, and all the funds which then belonged to the corporation in his custody were on deposit in the bank in St. Louis. A controversy then arose between the parties as to the amount that should be allowed him for his expenses, and this controversy finally resulted in this litigation. But during all the time from that date Powell has only been the custodian of the funds of the corporation. There is no testimony showing that all the funds have not been and have not remained in the bank since October, 1906; there is no testimony that Powell has used any of these funds since that date for his individual purposes. This litigation simply determines what portion of the funds thus in the hands of Powell as the custodian of the corporation shall be retained by him for his expenses, etc., and what portion thereof shall be paid over to the corporation for distribution among the shareholders. Until this is finally determined and Powell ordered by the court to pay the moneys over, he should not be charged with interest thereon.

6. The plaintiffs in their complaint sought to obtain an allowance for an attorney's fee for the prosecution of this suit. The defendants also sought credit for an attorney's fee paid by them, as they claim, for the benefit of the corporation in defense of this suit, to which it was made a party. The lower court refused to make any allowance for attorney's fees to either party, and we think it was right in thus ruling. This suit was instituted for the purpose, in part, of recovering assets of the corporation; but, under the view taken by this court of this case, it can only result in a settlement of the accounts of the various officers and shareholders with the corporation. Each of the parties to this suit had an account with the corporation, and the result of this litigation is to adjust those accounts. As to his own individual account, each party is an adversary in the suit, not only to the other shareholders but also to the corporation. As to such account,

each party is endeavoring to lessen the amount due from him, and as to the accounts of the other parties he is endeavoring to enlarge them. The subject-matter of the suit in its result involves the individual rights and interests of each party, and does not in effect involve those of the corporation. Each party should, therefore, pay the fees of his own attorneys, and neither party should be given an allowance for such purpose.

It follows from the foregoing that the decree of the chancery court must be reversed. But from such portions of the findings of the lower court which we have approved, and from the evidence which we have endeavored to carefully examine, we think that a just and equitable statement of the accounts of the parties can be made in accordance with the principles announced in this opinion. We will make the statement of these accounts, and the cause will be remanded with directions to enter a decree in accordance herewith.

The shareholders of the Red Bud Realty Company consist of J. C. South, Thomas Combs, L. L. Doyle, R. X. DeGraw, W. V. Powell and Frank Tuttle, each of whom is the owner of 400 shares of the capital stock of the corporation, except W. V. Powell, who is the owner of 399 shares, and Frank Tuttle, who is the owner of one share. The following is a statement of the funds belonging to the corporation and the sources from which they are derived:

Amounts received by W. V. Powell:

From sale of 808 lots at \$50 per lot.....	\$40,400.00
From Thomas Combs on printing, supplies, etc.....	1,250.25

Amount of interest on money used in payment of notes to Bank of Aurora:

On \$1,500 from Feb. 25, '05, to Oct. 15, '06,	
at 6 per cent.....	\$147.50
On \$1,500 from Mar. 25, '05, to Oct. 15, '06,	
at 6 per cent.....	140.00
On \$2,200 from Apr. 18, '05, to Oct. 15, '06,	
at 6 per cent.....	198.00 \$485.50

Total funds received by W. V. Powell.....\$42,135.75

Credits to which Powell is entitled in his account with the corporation:

Expenses in sale of 808 lots at \$15 per lot.....	\$12,120.00
Cash refunded on lots.....	1,385.00
Cash paid for printing plant and supplies.....	994.75

Total credits	\$14,499.75
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Total debits of Powell.....	\$42,135.75
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Total credits of Powell.....	14,499.75
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Balance due by Powell to corporation.....	\$27,636.00
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Account of Thomas Combs with the Red Bud Realty Company:

Amount received by Thomas Combs from sale of lots, rents, etc	\$20,063.82
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Credits:

Expenses, expenditures and salary.....	\$9,409.96
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Cash for land to self.....	3,000.00	12,409.96
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Balance due by Combs to corporation.....	\$ 7,653.86
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Statement of net funds belonging to corporation:

Funds due from Powell, as per above.....	\$27,636.00
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Funds due from Combs, as per above.....	7,653.86
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Total funds of corporation.....	\$35,289.86
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Statement showing net amount due by W. V. Powell to corporation, payments having heretofore been made to shareholders as follows:

Net funds in hands of Powell.....	\$27,636.00
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Amount heretofore paid to South....	\$1,120.00
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Amount heretofore paid to Combs....	2,020.00	3,140.00
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Net amount due from Powell for shareholders.....	\$24,496.00
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Statement showing net amount due by Thomas Combs to corporation; payments having heretofore been made to shareholders as follows:

Net funds in hands of Combs.....	\$7,653.86	
Amount heretofore paid to Powell....	\$300.00	
Amount heretofore paid to assignor of Doyle	300.00	
Amount heretofore paid to assignor of DeGraw	300.00	
Amount heretofore paid to South.....	3,040.00	
Amount heretofore paid to Thos. Combs	300.00	4,240.00

Net amount due from Combs for shareholders.....\$3,413.86

Statement of various amounts due from corporation to the shareholders:

W. V. Powell:

His 399-2000 share in net funds, as per above.....	\$7,040.33	
Less amount received from Combs.....	300.00	

Net amount due W. V. Powell from corporation....\$6,740.33

J. C. South:

His one-fifth share in net funds, as per above.....	\$7,057.97	
Less am't rec'd from Powell, as above..	\$1,120.00	
Less am't rec'd from Combs, as above..	3,040.00	4,160.00

Net amount due J. C. South from corporation.....\$2,897.97

Thomas Combs:

His one-fifth share in net funds, as per above.....	\$7,057.97	
Less amount received from Powell....	\$2,020.00	
Less cash from self.....	300.00	
Less amount now in hands belonging to corporation	3,413.86	5,733.86

\$1,324.11

R. X. DeGraw:

His one-fifth share in net funds, as per above.....	\$7,057.97	
Less amount received by assignor, as per above.....	300.00	

\$6,757.97

L. L. Doyle:

His one-fifth share in net funds, as per above.....\$7,057.97

Less amount received by assignor as per above..... 300.00

Net amount due L. L. Doyle from corporation.....\$6,757.97

Frank Tuttle:

His 1-2000 share in net funds, as per above.....\$ 17.64

Summary of net amounts due each shareholder from funds
of corporation:

To W. V. Powell.....\$6,740.33

To J. C. South..... 2,897.97

To Thomas Combs..... 1,324.11

To R. X. DeGraw 6,757.97

To L. L. Doyle 6,757.97

To Frank Tuttle 17.64

Total\$24,495.99

And the above will be paid out of said funds in hands of
W. V. Powell, amounting to \$24,496.

It appears from the testimony that after the alleged directors' meeting, held at Little Rock, Arkansas, in October, 1906, W. V. Powell paid to R. X. DeGraw and L. L. Doyle certain dividends. The amounts thus actually paid to them by Powell should be deducted from the above balances found due to them, and the remainder only should be paid to them, and the amount payable by Powell to the corporation should be reduced by the amounts so paid by him to DeGraw and Doyle after said meeting of October, 1906.

The shares of stock of Powell, Doyle and DeGraw were in effect pledged to pay all indebtedness due by Powell to the corporation, and were primarily pledged to secure the distributive portions of that indebtedness which were payable to South and to Combs. Doyle and DeGraw have by their acts and conduct assented to this, and therefore they and Powell must be postponed and paid after South and Combs have received their distributive shares. A lien will be declared upon the shares of stock of Powell, Doyle and DeGraw for the payment of the funds due by Powell to the corporation, and the distributive shares of

South and Combs will be first paid out of the proceeds of the collection of said funds.

HART, J., dissents.

DUNBAR v. CAZORT & MCGEEHEE COMPANY.

Opinion delivered October 31, 1910.

1. CORPORATIONS—WHEN ULTRA VIRES NO DEFENSE.—That a corporation exceeded its charter powers in becoming a surety for another cannot be pleaded by the principal who received the benefit of such contract. (Page 310.)
2. SAME—WHEN ULTRA VIRES NO DEFENSE.—Where a corporation became surety for another, and took a mortgage to indemnify itself, and paid the debt secured, neither the mortgagor nor her grantee can insist, in a suit to foreclose such mortgage, that the corporation exceeded its charter powers in becoming a surety for another. (Page 310.)
3. PRINCIPAL AND SURETY—JUDGMENT AGAINST SURETY—EFFECT.—A judgment against a surety on a bond, though by consent, is *prima facie* evidence of the amount of the surety's liability in a suit against the principal to foreclose a mortgage given by the principal to indemnify the surety against such liability. (Page 311.)

Appeal from Crawford Chancery Court; *J. Virgil Bourland*, Chancellor; affirmed.

Edwin Hiner and *George W. Dodd*, for appellant.

Neither by its articles of incorporation nor by the laws of the State is appellee impowered to lend its credit and become surety for others. Its attempt to become surety upon the supersedeas bond was *ultra vires*, and void. 10 Cyc. 1109; *Id.* 1153; 7 Wis. 59; 90 Ill. App. 287.

A consent judgment obtained under an *ultra vires* contract is of no more validity than the invalid contract upon which it was founded. 29 Am. & Eng. Enc. of Law (2 ed.) 49.

At the time of appellant's purchase, two years prior to the circuit court judgment, appellee had, at most, only a claim for unliquidated damages upon the supersedeas bond. The judgment is not even *prima facie* evidence against appellants. John Sharp and Ella R. Sharp were the primary debtors, and

the rule announced in 74 Ark. 528 applies. See also 83 Ark. 528.

Winchester & Martin and *Kimpel & Daily*, for appellee.

1. The burden of proving that an act of a corporation is *ultra vires* is upon the party who alleges it. In this case the judgment against appellee is *prima facie* evidence of the amount of the liability secured by the mortgage. 91 Ark. 400. Production of the articles of incorporation is not sufficient to show that the execution of the supersedeas bond was *ultra vires*. Until the burden of proof is satisfied, the presumption remains that the corporation acted within its powers. 10 Cyc. 1155; 4 Minn. 385; 20 N. J. Eq. 542; 97 N. Y. 378; 21 N. Y. 124; 19 N. Y. 369; 75 Am. Dec. 347.

Whenever it is necessary to enable a corporation to accomplish the objects for which it was created, or whenever it is reasonably necessary or proper for the protection of its business, a corporation may, though not expressly authorized by its articles, become surety or guarantor for another. *Marshall on Corp.*, § 69; 82 Fed. 355; 185 Ill. 37; 96 Wis. 239.

2. Appellants can not complain. Violation of its charter by a corporation does not give a third party, whose rights are not affected, any rights against the corporation. 26 U. S. (Law Ed.), 1015; *Thompson on Corp.*, § § 6033 *et seq.*; 10 Cyc. 1166. The plea of *ultra vires* will, as a rule, not prevail where it will not advance justice but will accomplish legal wrong. 74 Ark. 190; 98 Wis. 203; 63 N. Y. 62; 5 *Thompson on Corp.* § 6016; 70 Ark. 237, 239; 42 Am. St. Rep. 256. A corporation is estopped to plead *ultra vires* where it has received a benefit. 74 Ark. 190; *Id.* 377. And where a contract has been fully executed, neither party has relief against it. 120 Ill. 121; 5 *Thompson on Corp.*, § 6023 *et seq.*; 8 Otto 621. See also 70 Am. St. Rep. 156, note.

MCCULLOCH, C. J. The plaintiff, the Cazort-McGehee Company, a domestic corporation, together with one W. R. Bolling, became the surety of John Sharp and Ella Sharp on a supersedeas bond on appeal to the Supreme Court from a judgment against the latter in the chancery court of Crawford County, wherein Henry L. Fitzhugh, trustee in bankruptcy, was plaintiff, and said John Sharp and Ella Sharp were defendants. Ella

Sharp owned lands in Crawford County, Arkansas, and at the time of the execution of said bond she executed and delivered to the plaintiff a mortgage on one of said tracts of land for the following purpose recited therein:

"Whereas, the Cazort & McGehee Company have become sureties on a supersedeas bond given by John Sharp and Ella Sharp to supersede a judgment in favor of Henry L. Fitzhugh in the sum of four thousand dollars. Now, if the said John Sharp and Ella R. Sharp shall satisfy said judgment if affirmed or any judgment rendered against them by the Supreme Court in this cause, then this bond shall be void; but if they fail to do so, then the said grantees or their assignee, agent or attorney in fact, shall have power to sell said property at public sale to the highest bidder for cash, * * * and the proceeds of said sale shall be applied, first, to all costs and expenses attending said sale, second, to the payment of said debt and interest, and the remainder, if any, shall be paid to said grantor."

Subsequently the judgment appealed from was in part affirmed, and Fitzhugh, the judgment creditor, instituted an action against the sureties on the bond, and recovered the sum of \$2,500, which amount the plaintiff was compelled to pay in satisfaction of the judgment. The present action was instituted in the chancery court of Crawford County by the plaintiff, Cazort & McGehee Company, to foreclose the mortgage, and W. T. Dunbar, subsequent purchaser from Mrs. Sharp, was made a party defendant. From a decree foreclosing the mortgage Dunbar has appealed.

The principal contention of the appellant is that the corporation exceeded its charter powers in becoming surety, and that the contract of suretyship, and the mortgage as well, is void. At least two reasons may be stated, without searching for others, why this contention is unsound, or at least why the infirmity of the contract can not be pleaded. In the first place, Mrs. Sharp, one of the parties, received the benefit of the contract, and she and appellant, who derived his rights to the mortgaged property from her, are estopped from setting up the invalidity of the contract. In the second place, appellee has fully performed the contract on its part by paying the amount of the liability thereunder. Therefore it is an executed

contract on one side, and neither Mrs. Sharp, nor her grantee, who succeeded to her rights, can set up the fact that the execution of the contract was beyond the power of the corporation. *Minneapolis F. & M. Mut. Ins. Co. v. Norman*, 74 Ark. 190; *Arkadelphia Lbr. Co. v. Posey*, 74 Ark. 377; 3 Thompson on Corporations (2 ed.), § § 2787, 2788, 2789.

The judgment on the bond rendered in favor of Fitzhugh against the appellee, though a consent judgment, is *prima facie* evidence of liability for the amount recovered; and the proof introduced by the appellant was not sufficient to overcome this presumption. *Casort & McGehee Company v. Dunbar*, 91 Ark. 400.

Other questions are raised which are not of sufficient importance to discuss.

Decree affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. WOODS.

Opinion delivered October 31, 1910.

1. CARRIERS—RUNNING TRAIN AT UNUSUAL SPEED.—Ordinarily, it is not negligence *per se* to run a train at an unusual speed in a town, but the question is one of fact for the jury. (Page 314.)
2. INSTRUCTIONS—EFFECT OF CONFLICT.—The giving of a correct instruction will not cure an erroneous one where the two are directly conflicting. (Page 314.)
3. CARRIERS—DUTY TO PASSENGER AT STATION.—The exercise of ordinary care is the measure of the duty of a railroad company toward its passengers while waiting at a station to take a train; the duty of using the highest degree of care being exacted only during the time in which the passenger is on the train or is getting on or off. (Page 315.)

Appeal from Bradley Circuit Court; *Henry W. Wells*, Judge; reversed.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and *James H. Stevenson*, for appellant.

Appellee's sixth instruction is both abstract and an incorrect declaration of the law. It is an incorrect declaration of law

in placing the duty upon appellant in the operation of its trains to exercise (1) "the utmost care and foresight," and in making it responsible for the "slightest negligence," without reference to the party invoking the duty, and (2) in holding it to the duty to provide all things necessary to their (the passengers') security, reasonably consistent with their business, and appropriate to the means of conveyance employed by them." In such cases the railroad company is only held to exercise ordinary or reasonable care. 2 Hutchinson on Carr., § § 935, 936, 937, 989, 981; *Id.* § 941; 70 Ark. 136; 3 Thompson on Neg., § 2748; 65 Ark. 255; 257-8; 97 Cal. 114; 104 Mo. 239; 120 Ga. 380; 116 Ga. 743; 77 Ill. App. 66; 96 Ia. 169; 60 Atl. 710; 141 Mass. 31; 62 N. J. L. 7-12; 104 N. E. (Mich.) 390; 77 N. E. 1051; 83 Tex. 309; 106 N. W. 395; 6 Cyc. 608; 5 Am. & Eng. Enc. of Law, 532.

2. If appellee went to the depot with the *bona fide* intention of becoming a passenger (which is not conceded), if that constituted him in any sense a passenger, it did not of itself entail upon appellant that high degree and duty of care and protection which obtains when a passenger is on the train of the carrier. The second instruction given at his request is therefore erroneous.

3. The ninth instruction given at appellee's request errs (1) because it holds appellant liable for the striking of the mule in the event *either the engineer or fireman* could, by keeping a lookout, have discovered it in time to avoid the injury, and (2) it is abstract and misleading. 65 Ark. 619; 64 Ark. 236; 62 Ark. 182.

4. The fifth instruction errs in telling the jury that appellant was liable if, by the exercise of ordinary care it could have avoided striking the mule, etc., had it been operating the train at its usual rate of speed. Elliott on Railroads, § 1160; 66 Ark. 363, 366; 76 Ark. 100.

5. There is no duty resting upon the operatives of a train to stop it on account of the proximity of an animal to the track, unless it is apparent, or, in the exercise of ordinary care, it should be apparent, that the animal will be struck or injured unless the train is stopped. 37 Ark. 393; 69 Ark. 619; 36 Ark. 607; 66 Ark. 248.

R. W. Wilson, Joe T. Robinson and Garland Streett, for appellee.

1. Whether or not the high rate of speed was negligence under the circumstances of this case, was a question for the jury. 99 S. W. 865-6; 3 Legal Gazette, 102; 64 N. Y. 526; 23 S. W. 596; 85 S. W. 493; 67 S. W. 541; 29 S. W. 232; 68 Ark. 606; 40 Ark. 298; 51 Ark. 459; 57 Ark. 287; 34 Ark. 613; 64 Ark. 237; 97 S. W. 729; 84 Ill. 397.

2. No error in second and sixth instructions given at appellee's request. 51 Ark. 466; 68 Ark. 606; 60 Ark. 550.

3. The sixth instruction does not impose upon appellant the highest *possible* degree of care, but the highest practicable degree of care, commensurate with the possible dangers. 60 Ark. 567.

4. It may be the duty of either or both the engineer and fireman to keep a lookout. 64 Ark. 236.

MCCULLOCH, C. J. The plaintiff, Rush Woods, sues the railroad company to recover damages for personal injuries received in a peculiar and somewhat unusual manner, though alleged to be the result of negligence on the part of defendant's servants in the operation of its train. On the night of January 2, 1908, he was standing on the company's platform at Morrell, Arkansas, awaiting the approach of a passenger train on which he expected to embark, when the engine of that train struck a mule, knocking it over against plaintiff and severely injuring him. Negligence of defendant's servants is alleged in running the train at an excessive and unusual rate of speed when approaching the station, and in failing to exercise care to prevent striking the mule after its presence was discovered on the track. There was a trial before a jury, resulting in a verdict in favor of plaintiff.

The train was several hours behind schedule time when it reached Morrell, and evidence was adduced to the effect that when it approached the station the rate of speed was greater than usual, and that it ran nearly 200 feet beyond the customary stopping place. The engine struck the mule. The mule, with others, came out from behind a seed-house or platform near the station. There is a conflict in the evidence as to whether or not the engineer and fireman were prevented,

by reason of the curved track, from seeing the stock ahead near the track in time to slow up the train. Evidence was also adduced to the effect that no stock alarm was sounded, though it was proved beyond dispute that the engine whistled at the proper place for the station.

Morrell is an incorporated town, containing from three hundred to five hundred inhabitants.

The trial court gave, over the objection of defendant, the following among other instructions: "5. If you find from the evidence that the defendant was operating its train at an unusual speed in the town of Morrell, and by reason thereof struck a mule, and if you find that by the exercise of ordinary care defendant could have avoided striking said mule and injuring plaintiff, had it been operating said train at its usual rate of speed, the defendant is liable."

The effect of that instruction was to declare the running of the train at an unusual rate of speed in the town of Morrell to be negligence *per se*, and that the defendant was liable if the injury would not have occurred otherwise. This is not correct, for it should have been submitted to the jury to determine whether or not the running of the train at the unusual rate of speed, under the circumstances, constituted negligence. Judge Elliott correctly states the rule on the subject as follows:

"In the absence of any statute or ordinance on the subject, no rate of speed is negligence *per se*. But, when considered in connection with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury." Elliott on Railroads, § 1160.

This is the rule adopted by this court. *Ford v. St. Louis, I. M. & S. Ry. Co.*, 66 Ark. 363; *St. Louis, I. M. & S. Ry. Co. v. Kimberlain*, 76 Ark. 100.

The court gave another instruction at defendant's request, telling the jury that running the train at an excessive and unusual rate of speed is not negligence *per se*, but this did not cure the error of the former instruction, as the two were directly conflicting.

The giving of the following instruction is also assigned as error: "6. Railroad companies in operating trains are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent upon them is to provide for safety of their passengers. To this end, they are required to provide all things necessary to their security, reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to exercise the highest degree of practicable care and diligence and skill in the operation of their trains."

The objection to the instruction is that it is abstract in this case, and also that it is an incorrect statement of the law applicable to the case. The declaration that railroad companies are required to provide all things necessary to the security of passengers, reasonably consistent with their business and appropriate to the means of conveyance employed by them, is abstract, and is inapplicable to the facts of this case, for the reason that the question of failure to provide the things necessary to the security of passengers is not involved in the controversy, and the failure to provide things for their safety had nothing to do with plaintiff's injury. The jury might have inferred from it that it was the duty of defendant to provide some means of security against the happening of such an occurrence as this. There is no proof that the platform or waiting room at the station was unsafe, or that the company omitted anything reasonably necessary for the security of passengers.

The instruction is incorrect because it places too high a degree of care upon the company as to passengers waiting at stations. The exercise of ordinary care is the measure of the duty of a public carrier to protect passengers while at stations. *Hutchinson on Carriers*, § 935, 941; 3 *Thompson on Negligence*, § § 274, 278; *Huddleston v. St. Louis, I. M. & S. Ry. Co.*, 90 Ark. 378; *St. Louis, I. M. & S. Ry. Co. v. Wilson*, 70 Ark. 136; *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 65 Ark. 255.

The higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier, while on the train or getting on or off, for then only is the passenger subjected to the peculiar hazards of that

mode of travel against which the carrier must exercise the highest degree of skill and care. *Falls v. San Francisco & N. P. Rd. Co.*, 97 Cal. 114. But when those extraordinary hazards have ceased, or before they have begun, the degree of care is relaxed, as the necessity for it ceases.

The errors in giving the two instructions hereinbefore mentioned were prejudicial, and for this reason the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

SPRINGFIELD v. FULK.

Opinion delivered October 31, 1910.

1. BILL OF EXCEPTIONS—FAILURE OF JUDGE TO SIGN—REMEDY.—Mandamus is the proper remedy to compel the signing of a bill of exceptions—not to require the trial judge to insert any particular matter, but to sign a bill of exceptions which he approves as being correct. (Page 317.)
2. STATUTES—DECISIONS UNDER SIMILAR STATUTES.—Where a statute of this State is substantially like that of another State, decisions of that State construing such statute are peculiarly persuasive in determining rights under the statute of this State. (Page 318.)
3. BILL OF EXCEPTIONS—FAILURE OF JUDGE TO SIGN.—Where a party in good faith presented his bill of exceptions, which he has a reasonable expectation of having signed by the judge, he is not prejudiced by necessary delay taken by the judge for his own convenience or for the purpose of giving it a thorough examination. (Page 319.)

Mandamus to Pulaski Circuit Court; *F. Guy Fulk*, Judge; writ awarded.

Bratton, Fraser & Bratton, for petitioners.

Kirby's Digest, § 6225, settles the duties of the trial judge with reference to signing the bill of exceptions. If the bill of exceptions presented is true, he must allow and sign it; if not true, it is his duty to correct it, or cause it to be corrected, and sign it. Upon his failure to perform this duty when a bill of exceptions is presented within the time required by law or the order of the court, mandamus will lie to compel him to do so. 3 Cyc. 24; *Id.* 47, note 30; 35 Ark. 568; 129 Ill. 777.

When the bill of exceptions is presented within the time allowed, the appellant's rights will not be prejudiced by the judge's delay in signing it. 3 Cyc. 44; 12 Pac. 202; 58 S. W. 440; 6 Ky. Law Rep. 736; 12 *Id.* 989; 80 Me. 270; 158 Ill. 237; 160 Ill. 288.

J. W. Blackwood, for respondent.

McCULLOCH, C. J. Petitioners have appealed from an adverse judgment of the circuit court of Pulaski County in the matter of the contest of the will of J. P. Steen, deceased, and they now seek a mandamus requiring the Honorable Guy Fulk, judge of said court, before whom the case was tried, to sign a bill of exceptions. The motion for new trial was overruled by the circuit court on February 25, 1910, and an order was entered giving ninety days from that date within which to prepare and file their bill of exceptions. The time expired therefore on May 27, 1910.

A transcript of the oral proceedings, covering several hundred pages, was prepared by a stenographer, and delivered to counsel for petitioners to be incorporated into a bill of exceptions, and the bill was by them delivered to opposing counsel for the latter's examination and approval. Petitioner's counsel obtained the bill of exceptions from opposing counsel on May 25, the latter declining, however, to approve it on account of alleged inaccuracies; and on the morning of May 26 it was delivered to Judge Fulk to be signed. Judge Fulk was that day engaged in jury trials, and, after a partial examination of the bill of exceptions, he concluded that it would need correction, and he directed the clerk to file the unsigned bill, pending his examination thereof.

The time allowed for filing the bill of exceptions passed without anything further being done, but thereafter Judge Fulk took up the matter with counsel on both sides, in an effort to have the proper corrections made, so that he could sign the bill. Counsel for appellee then objected to the signing of the bill of exceptions after the time allowed by the order of court, and made a motion in the circuit court to strike from the records the unsigned bill, and this motion was sustained.

It seems to be settled that mandamus is the proper remedy to compel the signing of a bill of exceptions—not to require

the trial judge to insert any particular matter in the bill, but to sign a bill of exceptions which he approves as being correct. Elliott, Appellate Procedure, § 516; *State v. Gibson*, 187 Mo. 536; *People v. Van Buren*, 41 Mich. 725.

The statute relative to the signing of bills of exception is as follows: "Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing and present it to the judge for his allowance and signature. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large upon the order book. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and, when corrected, sign it." (Section 6225, Kirby's Digest).

It will be seen from this statute that a party has the right to present a bill of exceptions which he conceives to be correct, and that, if it is correct, it is the duty of the judge to sign it, or, if he finds it incorrect, it is his duty to correct it, and then sign it. There are numerous decided cases to the effect that "where a bill of exceptions is presented to the trial judge within the time prescribed, the rights of appellant or plaintiff in error will not be prejudiced by the judge's delay in signing it. In such cases the maxim *actus curiae neminem gravabit* applies."

3 Cyc. 44; 3 Am. & Eng. Enc. Pl & Pr., 474; Elliott, App. Proc., § 802; *Proctor Coal Co. v. Strunk*, 89 S. W. (Ky.) 145; *Toney v. South Covington, etc., Str. Ry. Co.*, 58 S. W. (Ky.) 440; *Johnson v. Tanner*, 126 Ga. 718; *Field v. Gellerson*, 80 Me. 270; *West Chicago St. Rd. Co. v. Morrison, etc., Co.*, 160 Ill. 288; *Denver v. Capelli*, 3 Col. 236; *Cochrane v. Little*, 71 Md. 323; *People v. Judge Super. Ct.*, 41 Mich. 725; *Davis v. Patrick*, 122 U. S. 138.

In *Ray v. Grove*, 6 Ky. Law Rep. 736, the court said: "Where the time for filing a bill is extended to a day in the next term, and the bill is tendered within the time thus allowed, though not signed and filed until a subsequent day, the requirements of the law have been complied with; and this is true, though the court may find it necessary to make some corrections in it at the time the judge signs it, provided appellant has in good

faith tendered what he considered a true account of the proceedings on the trial.”

Our statute on the subject is substantially like the Kentucky statute, and the decisions of the courts of that State are peculiarly persuasive in determining rights thereunder. It is not necessary in this case to hold that a bill of exceptions must be signed by the judge, even though it is presented to him at the last moment, when it is physically impossible for him to give any reasonable amount of attention to it. All that we find it necessary in the present case to hold is that where a party in good faith presents his bill of exceptions, which he has a reasonable expectation may be examined and signed by the judge, so that it may be filed within the time allowed, he is not prejudiced by necessary delay taken by the judge for his own convenience, or for the purpose of giving the bill of exceptions presented a thorough examination. In this case it appears that counsel for petitioners delivered the bill of exceptions to opposing counsel six or seven days before the time expired; it was returned without approval, and they endeavored to present it to the judge on May 25, which was three days before the expiration of the time. Failing to find the judge, they actually presented it to him early in the forenoon of the 26th, which gave the whole of two days for examination. It can not be said, under those circumstances, that the presentation was not made in good faith and with a reasonable expectation that his Honor, the trial judge, could fully examine it in time to sign it before the period allowed expired. It does not appear that counsel purposely delayed the matter, or that they presented an incorrect bill of exceptions for the purpose of securing further delay.

There are decisions of this court holding that a bill of exceptions must not only be signed by the judge, but must be filed with the clerk within the time allowed by the court. *Watson v. Watson*, 53 Ark. 415; *Stinson v. Shafer*, 58 Ark. 110. The conclusion we reach on this question does not at all weaken the force of those decisions, for we hold only that it is the delay caused by the trial judge which excuses. After a bill of exceptions is signed, any delay on the part of the litigant in filing it is chargeable to him; and if the bill of ex-

ceptions is signed before the expiration of the time, but not filed, it is the fault of the litigant, and he must bear the loss.

The writ of mandamus is therefore awarded.

JOHNSON v. WILKERSON.

Opinion delivered October 31, 1910.

1. **CONTRACTS—CONSTRUCTION AS ENTIRETY.**—The entire contract must be looked to as a whole in determining the consideration for its various obligations and the question of the mutuality of the obligations. (Page 324.)
2. **SAME—ADEQUACY OF CONSIDERATION.**—One consideration is sufficient to support several undertakings and promises. (Page 324.)
3. **APPEAL AND ERROR—HARMLESS ERROR.**—The court's refusal to transfer a law case to equity for the purpose of reforming the contract sued on was not reversible error if appellant was not prejudiced thereby. (Page 324.)

Appeal from Woodruff Circuit Court; Northern District;
Hance N. Hutton, Judge; affirmed.

J. F. Summers, for appellant.

1. The court should have instructed the jury to return a verdict for the defendant. The contract, as appears by the first three paragraphs, is without consideration on the part of appellee.

2. The case should have been transferred to equity because of the mistake in reducing the agreement to writing, which was not discovered until after the commencement of this action. 71 Ark. 484; Kirby's Digest, § 5995.

H. M. Woods, for appellee.

1. The sixth clause of the contract, providing for a deed from appellee "for the sum named herein for all her right, title and interest in and to the above described land," shows a sufficient consideration. 9 Cyc. 311, and cases cited; 24 Ark. 197-201; 12 L. R. A. 463, note.

2. Transfer to equity was properly refused in this case. If reformation of the clause in which the mistake is alleged

to have been made were effected, still, under the fifth clause of the contract, appellant would be liable.

McCULLOCH, C. J. The plaintiff, Mrs. Wilkerson, owned an undivided two-thirds of certain lands in Woodruff County, and sold and conveyed her said interest to defendant for the price of \$10,000. The remaining third was owned by plaintiff's four grandchildren (the children of her deceased daughter, Minnie Williams), two of whom were minors.

At the time of the conveyance, the plaintiff and defendant entered into the following written contract:

"Whereas, O. L. Johnson and Mrs. Josephine Wilkerson agreed that fifteen thousand (\$15,000) dollars was to be the purchase price of the east half of the southeast quarter of section seven (7), township seven (7) north, range three (3) west; and it being agreed at the time that O. L. Johnson would pay Mrs. Josephine Wilkerson said amount of money for a good title to said place. And whereas, it appears at this date that Mrs. Josephine Wilkerson can make a good title to but an undivided two-thirds (2-3) interest of said land, or the greater portion thereof. And whereas, for the sum of ten thousand (\$10,000), she has this day executed to O. L. Johnson her deed for said land, and it appearing that the heirs of Minnie Williams own an undivided interest in said land, and that some of said heirs are minors, O. L. Johnson hereby agrees that, if all of said interests is acquired by him, he will upon acquisition pay the sum of five thousand dollars, said acquisition to be made within two (2) years from this date. He further agrees that, if a one-half interest in the outstanding one-third (1-3) interest be acquired by him within twelve months, he will pay therefor the sum of two thousand five hundred (\$2,500) dollars, and if said one-half of the outstanding one-third ($\frac{1}{3}$) interest be acquired by sale and order of court, or from individuals at a less figure than two thousand five hundred (\$2,500) dollars, he will pay to Mrs. Josephine Wilkerson the difference in the price at which he acquires it and the sum of two thousand five hundred (\$2,500) dollars. He further agrees that within two years from this date he will bid the sum of two thousand five hundred (\$2,500) dollars for the remaining one-half ($\frac{1}{2}$) of one-third ($\frac{1}{3}$) interest if

said interest is offered at public sale, and if purchased for a less sum by him he would pay to Mrs. Josephine Wilkerson the difference between the price at which said interest was acquired and two thousand five hundred (\$2,500) dollars. The consideration for this agreement being the execution by Mrs. Josephine Wilkerson for the sum named herein of all her right, title and interest in and to the above-described land. * * * It is further understood and agreed that, in the event that the one-half ($\frac{1}{2}$) of the one-third ($\frac{1}{3}$) outstanding interest of the heirs of Minnie Williams be not acquired within one year from date hereof, this entire memorandum and agreement is to be void and of no effect."

Within one year after the execution of this contract defendant purchased at public sale the interest of the two minors, and paid therefor the sum of \$2,500; and within the next year (within two years after execution of the contract) he purchased the interest of the two adults, paying one of them \$1,250 and the other \$250 for his interest. Mrs. Wilkerson instituted this action against defendant to recover under the contract \$1,000, the difference between \$1,250 and the amount of \$250, which he paid for the last-mentioned interest. The plaintiff recovered judgment, and the defendant appealed.

The facts are undisputed, and we are to determine from them whether or not the plaintiff is entitled to recover the sum demanded.

The time mentioned is necessarily of the essence of the contract, from its very nature, and, in order for plaintiff to recover, the facts must bring her within the terms of the contract as to the time stipulated. •

It will be observed that under the fourth paragraph of the contract, if one-half of the outstanding third interest should, within twelve months "be acquired by sale and order of court or from individuals" at a less figure than \$2,500, then defendant agreed to pay plaintiff the difference between the sum paid and \$2,500. This clause of the contract was satisfied by the purchase of the two minors' interest at public sale for \$2,500 within one year from date of the contract.

The next clause provides that defendant shall within two years bid at public sale the sum of \$2,500 for the remaining half of the third interest, and if purchased for less than that

sum he will pay the difference to plaintiff. The only purchase made by defendant at public sale was within one year, and for the sum of \$2,500, so he is liable for nothing on account of that purchase.

Under the contract, the requirement that defendant should pay to plaintiff the difference between \$2,500 and the amount of his purchase price from individuals (meaning, of course, the adults), if he purchased that interest for less than the sum named, was, according to the strict letter of the contract, dependent upon the purchase having been made within one year from the date of the contract. The only specific provision in regard to a purchase after one year and within two years was with reference to a bid at public sale.

Now, since defendant did not purchase the interest of the adults within one year, and did not purchase the interest of either of the minors for less than the stipulated sum, it can be argued with much force and plausibility that he is not liable under the contract to plaintiff for any sum. In other words, that, in order to make him liable to plaintiff on account of the purchase of an adult's share for less than \$1,250, the defendant must have purchased it within one year from the date of the contract, for, it is contended, the contract contains no specific provision requiring him to pay the difference under any other circumstances. We conclude, however, that that is too narrow an interpretation of the contract. The third paragraph contains an agreement in general terms on the part of the defendant to pay \$5,000 for the acquisition of the remaining third interest, provided the acquisition should be within two years from date of the contract. We can discover nothing in the contract indicating an intention of the parties to lay any stress on the particular manner in which any of the outstanding interests should be acquired, whether by voluntary sale of the adults' interest or public sale of the interest of the minors. Time and the amount of the purchase price were the only limitations fixed in the contract, and plaintiff's demand falls within the limits thus prescribed. We think that, under a fair and reasonable interpretation of the contract, if defendant purchase one-half of the outstanding third interest within a year, and the remaining half within two years, he is liable to plaintiff for the difference if he purchased the other

half for less than \$2,500, regardless of the manner in which he acquired the property or the particular heirs whose interests he acquired by the last purchase.

The entire contract must be looked to as a whole in determining the consideration for its various obligations, and also in determining the question of the mutuality of the obligations. The sale and conveyance of plaintiff's part of the land for the sum of \$10,000 supported the whole contract and each undertaking thereof, and also rendered the undertakings mutual. One consideration is sufficient to support several undertakings and promises. Page on Contracts, § § 278, 305; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113; *Moshker v. Wilard*, 169 Ill. 276; *Ross v. Parks*, 93 Ala. 153.

The defendant alleged in his answer that a mistake was made in drafting the fourth paragraph of the contract, which should have been as follows:

"He further agrees that, if a one-half interest in the outstanding one-third interest be acquired in twelve months, he will pay therefor the sum of two thousand five hundred dollars; and if said one-half of the outstanding one-third interest be acquired by sale or order of court, or from individuals at a less figure than two thousand five hundred dollars by Josephine Wilkerson, he will pay Mrs. Josephine Wilkerson said sum of \$2,500."

He asks in his answer that the contract be reformed so as to make it speak the real agreement of the parties, and he requested the circuit court to transfer the case to the chancery court so that the proper relief could be granted. The court refused to transfer the cause, and that ruling is assigned as error.

If the contract should be amended in the particular mentioned, that would not relieve him from liability for plaintiff's claims. He is not liable under that paragraph, for he paid the full amount stipulated therein, and it matters not whether he purchased directly from the heirs or from the plaintiff. It is under the next paragraph that he is liable for his purchase within two years of the remaining half of the third interest, which he got at \$1,000 less than the price he agreed to pay or to pay the difference to plaintiff. So, according to the undisputed facts in the record, the defendant is liable for the sum recovered.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. TYUS.

Opinion delivered October 31, 1910.

MALICIOUS PROSECUTION—BURDEN OF PROOF.—One who sues for malicious prosecution must establish not only that he was innocent of the charge but also that there was no probable cause for the prosecution.

Appeal from Ashley Circuit Court; *Henry W. Wells*, Judge; reversed.

STATEMENT BY THE COURT.

The appellee was a section foreman on appellant's railroad. He sued appellant for malicious prosecution, alleging that on the 8th day of April, 1908, plaintiff was in the employ of defendant railroad company as section foreman, and was stationed at Portland, Arkansas. That on said day the said defendant through its agent caused him to be arrested under the false charge of obtaining money under false pretenses, and on said day he was discharged from the employment of said company. And said defendant caused said false charge to be referred to the grand jury of Ashley County, and said grand jury ignored said charge, and refused to find any bill against said plaintiff, and plaintiff denies that any probable cause existed. That said charge was false and untrue, and that by reason of said arrest and discharge he had been damaged in the sum of \$600 for loss of employment, for injury to his character and reputation, \$2,000, and for the humiliation and shame of said charge, the sum of \$2,500. That he is now advanced in years, has spent practically his life in the service of the railroad company, and has always borne a good reputation, and has always to the best of his ability faithfully and honestly performed the service entrusted to him.

The appellant denied all the material allegations, and alleged: That the said plaintiff was arrested on a charge of obtaining money under false pretenses from said defendant company, and that at the time the affidavit was made the agent and employees of said company had reasonable grounds to believe, and did believe in good faith, that the said plaintiff had made false

and fraudulent entries upon his payrolls and padded the same and carried straw men thereon, and obtained money from said defendant company by reason of said false and fraudulent pretenses; and that said agent had reasonable grounds to believe that said pretenses were false and fraudulent, and that said affidavit and arrest were made in good faith and without malice and upon reasonable grounds to believe that said plaintiff had been guilty of the charges so made, and that said arrest was made in good faith, believing said charges to be true and that they had reasonable grounds therefor.

The evidence on behalf of appellee tended to prove that he was arrested on a warrant sworn out by the division engineer who had supervision over the appellee, who was a section foreman. The warrant charged appellee with the crime of obtaining money under false pretenses. Appellee was taken before a magistrate and waived examination, giving bond for his appearance before the circuit court to answer any charge that might be brought against him. Appellee was not indicted by the grand jury. It investigated the charge, but found no bill. The man who swore out the warrant did not appear before the grand jury.

It was the duty of appellee as section foreman to keep a record of the laborers he employed. The record should show the time the laborers worked. He entered the time in a book kept for that purpose with the name of each laborer. It had been the custom of the road since appellee had been in its employ, for many years, to close up the time book on the night of the 27th of each month, and the number of men working on the 27th was reported as working to the end of the month. The appellee explained as follows:

"On the time book was the 28th, 29th, 30th and 31st, and sometimes these men wouldn't work, and it was the rule to wire their time off. I had three men, after the time book was made out, that didn't work the 28th, 30th and 31st of March; I wired the roadmaster to take the 28th, 30th and 31st from the payroll of these men, and if they didn't take it these three men got pay for work they didn't do. I sent the roadmaster a message. We mail our time books to the roadmaster, and he forwards them to the division engineer. As section boss, I had nothing to do with the paying of the hands. None of the money

came into my hands for the purpose of paying the hands; they were paid by check after they discontinued running the pay-car. I was not guilty of the charges made in these papers."

The time books appellee kept were identified and introduced. General instructions were entered in these books, showing how they should be kept. Among these instructions was the following:

"1. Foremen must enter information daily."

"2. Time must be shown on the date the labor was actually performed. Foremen must return no time except for labor actually performed."

The record of the time of several laborers as kept by appellee was then introduced. Appellee testified that it was correct. It reported that the laborers, naming them, had worked a specified number of hours for a specified number of days, and that each was due a certain sum for the total number of hours he had worked during the months reported. Appellee testified that he loaned several of the laborers money, and that he reported this as for board due him; that appellant allowed him to collect money that he had loaned the laborers, deducting the amount thus due him from the amount of their wages.

Appellee also testified: "On March 19 I had five men, seven with me and the lamptender. I reported six men working that day; I had five." Appellee reported that a man by the name of Abe Washington worked during the month of March, 1908, eight days of ten hours each, making a total of eighty hours, and that the amount due him for his labor was \$10, and that Washington was due appellee \$6.50. Appellee reported that Dan Parker had worked during the month of March five days of ten hours each, making a total of fifty hours, for which the amount due him was \$6.25, from which should be deducted in appellee's favor for borrowed money, \$3.90. He reported that Harrison Parker worked in February, 1908, sixty-eight hours, and that there was due him \$8.50. Appellee reported that the sum deducted in his favor for board was \$6.15, making amount payable to Parker \$2.35.

Appellee further testified that he was allowed 65 per cent. off of the amount due the laborers for their board. He reported that John West worked for him 245 hours during the month of

March, 1908; John West borrowed money from him in the sum of \$8.65, but did not board with him at all. He reported the sum and deducted it as board. Jim Almond was reported as having worked 175 hours. He did not board with appellee, but appellee let him have goods and money amounting to the sum of \$21.80, and deducted it out of the sum which he reported as due Almond for his wages.

R. L. Morris, the division superintendent, testified that when he went to the Valley Division the superior officers of the road informed him that the section foremen and extra gangs were padding their payrolls. They told him his duty would be "to get behind the section foremen, and get the money and put it on the track." His duty was to get a statement and check the foremen. He tells how they proceeded to check the foremen, and, without going into detail, his testimony shows that he ascertained that appellee on different days was working a less number of men than his time book showed; for instance, on one day, 19th of March, 1908, his time book showed that he had worked five men, when in fact they found that he only worked two men that day. On the 25th he checked appellee's gang, and found four men on his section. His time book showed that on that day he had seven men at work. The roadmaster was instructed after that to stay with that section and watch it closely. The roadmaster reported to Morris as follows: "On the days I have checked Foreman Tyus I find that he carries on his payroll from two to three more men than are actually on the job." The check of the roadmaster and the general roadmaster showed that appellee carried more men on his payroll than were actually working. Witness went to Portland with this information in hand, questioned the negroes relative to the time they had worked. He had the laborers' statements reduced to writing, and had them make affidavit before the magistrate. Their sworn statements correspond with the statement given witness by the roadmaster and the general roadmaster and with witness' own check. He therefore made affidavit for the arrest of appellee. Witness was not personally acquainted with appellee, had never talked to him previous to the information brought to him showing that appellee was "carrying dead men" on his payrolls; witness was thoroughly convinced he was car-

rying "dead men." Witness then continued his testimony as follows:

"The payroll shows that John West made during the month, according to the time turned in by Foreman Tyus, twenty-four and a half days, making a total of \$30.60. John West got \$21.70 paid by check. When I talked to John West he told me that he made about sixteen or seventeen days—not to exceed eighteen days. Tyus put in twenty-four five-tenths days. West testified to me that he had been sick twice during the month, and that he was unable to work during these two spells, so he only put in sixteen or seventeen days. The payroll shows paid to Mr. Tyus on deduction for board, \$8.72. During the month of March the payroll shows that Mr. Tyus drew \$65.35 for board. Dan Parker never got anything that month. He never signed any payroll at all that month. The way Mr. Tyus got this board money was this: John West made seventeen and three-quarter days, as he claims that would give John West \$21.70. Then Mr. Tyus would tie onto that whatever amount it would be—\$8.65 is shown on this roll. He would turn in on his time book the correct time for John West \$21.70; John West would then draw his check for \$21.70, which was actually coming to him. It would be all right as far as John knew; but this \$8.60 was turned in for board against John. Mr. Tyus added in sufficient amount of days to make this \$8.65, and take that as board deduction. John didn't sign this as authorizing the board deduction, and didn't authorize it. He told me that, and made affidavit to it."

The testimony of the witnesses John West, Dan Parker, Jim Almond and Harrison Parker showed in effect that they had worked as section men under appellee, that he had reported more time than they had worked, that he had not loaned them the money he had reported, and that they had not boarded with appellee. Their testimony tends to prove that what they had reported to Morris and had made affidavit to before the magistrate was correct. Two of these witnesses testified that they did not know a man by the name of Abe Washington, who was reported by appellee to have worked on the section at the same time they worked, that no such man worked there, and one of these told Morris that no such man as Abe Washington worked

there. The court correctly instructed the jury as to the essential elements of a malicious prosecution.

The jury returned a verdict of \$3,000 in favor of appellee. Judgment was entered against appellant in that sum, and it appeals.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and James H. Stevenson, for appellant.

There is no evidence of want of probable cause for the prosecution of appellee. The verdict is therefore without evidence to support it. 2 Greenleaf on Ev., § 454; 33 Ark. 316; 32 Ark. 763. Proof of plaintiff's innocence of the charge made against him does not establish a lack of probable cause. 33 Ark. 322; 60 Kan. 4.

George W. Norman and James C. Norman, for appellee.

Failure of the grand jury to find an indictment against plaintiff was *prima facie* evidence of want of probable cause, sufficient to throw upon defendant the burden of proving the contrary. 41 N. J. L. 22; 39 S. E. 661; 114 Fed. 317; Cooley on Torts, 184; 49 N. W. 106; 27 Am. St. Rep. 25; 38 *Id.* 853; 28 Atl. 135; Newell, Mal. Pros. 283; 23 So. 447; 59 Mo. 557; 76 Mo. 660; 50 Mo. 83. Proof of want of probable cause is to prove a negative, which requires only slight evidence. Newell, Mal. Pros., 282, par. 7.

WOOD, J., (after stating the facts). One of the grounds of the motion for new trial was that the verdict was contrary to the evidence. The court should have granted the motion on that ground. In *Chrisman v. Carney*, 33 Ark. 316, 322, we said: "The mere innocence of the party accused will not sustain an action for malicious prosecution, if the circumstances be such as to induce the prosecution to suppose the party proceeded against to be guilty. "For," as Blackstone says, "it would be a very great discouragement to the public justice of the kingdom if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried, and therefore any probable cause for preferring it is sufficient to justify it." 3 Blk. Com., 126-7. And in *Lavender v. Hudgens*, 32 Ark. 763, this court held that: "The want of probable cause is a material averment in an action for

malicious prosecution; and, though negative in form and character, it must be proved by the plaintiff, when put in issue, by some affirmative evidence." The undisputed facts of this record show that there was "a probable cause" for the prosecution that was instituted by appellant against appellee in the justice's court. The uncontroverted evidence shows that Morris, the agent of appellant who instituted the prosecution, was in possession of information that warranted him in suspecting that appellee was guilty of defrauding appellant by obtaining money in the manner disclosed by the evidence. The undisputed facts certainly warranted one charged with the duties of the division engineer in believing, or at least strongly suspecting, that appellee, in the nomenclature of the craft, "had padded the payrolls." That was sufficient to justify the criminal proceeding against him. If the evidence upon which Morris acted was not disclosed in the record, then the fact that the grand jury did not find a true bill against appellee might be taken, at least, as presumptive evidence that there was no probable cause for the proceedings against appellee. But the record discovers all the facts, and shows what prompted Morris to institute the criminal proceedings.

In our opinion these facts show beyond doubt or controversy that the suspicions of Morris were well grounded. While slight and groundless suspicion would not be sufficient, a belief or suspicion, well founded or based upon reasonable and probable ground, would be.

This being true, the liability of appellant is not established. The evidence of appellee, at most, only tends to show that he was innocent of the crime. But the burden was on him to show want of probable cause. The evidence does not even tend to show that there was lacking a probable cause for the prosecution. But, on the contrary, the affirmative and undisputed evidence shows the existence of such cause.

The judgment is therefore reversed, and the cause is dismissed.

JONES v. COFFIN.

Opinion delivered October 31, 1910.

1. **PROHIBITION—JURISDICTION OF SUPREME COURT.**—The Supreme Court may issue writs of prohibition by virtue of its superintending control over inferior courts, and in aid of its supervisory jurisdiction, when they are proceeding without jurisdiction. (Page 336.)
2. **COURTS—APPEAL TO CIRCUIT COURT—DUTY OF COUNTY CLERK.**—Where the clerk of the circuit court has granted an appeal to that court in a proceeding pending in the county court, as authorized by Kirby's Digest, § 1487, it is the duty of the county clerk to transmit all of the original papers and a transcript of the record entries to the clerk of the circuit court, whether the appeal was properly granted or not. (Page 337.)
3. **SAME—APPEAL FROM COUNTY COURT—AUTHORITY OF CIRCUIT COURT.**—Where an appeal has been granted from the county to the circuit court by the circuit clerk, the latter court has jurisdiction to pass upon the questions whether it has jurisdiction to hear the cause on appeal, and who are the parties thereto, and to issue a rule upon the county clerk to require him to bring up all the papers in the cause. (Page 338.)
4. **SAME—APPEAL FROM COUNTY TO CIRCUIT COURT—DUTY OF COUNTY CLERK.**—It is the duty of the county clerk to obey the order of the circuit court directing him to transmit the original papers in a cause appealed from the county to the circuit court though he had been ordered by the county court not to do so; and if in so doing he should be adjudged guilty of contempt by the county court, such judgment would be void. (Page 338.)
5. **APPEAL AND ERROR—WHEN APPEAL LIES.**—Where the circuit court erroneously decides that it has jurisdiction of an appeal from the county court, the remedy is by appeal. (Page 338.)
6. **PROHIBITION—RIGHT TO REMEDY.**—Though a county clerk could not have appealed from a decision of the circuit court on appeal from the county court if he was not a party to the record, an erroneous decision of the circuit court as to its jurisdiction could not affect him, so as to entitle him to the writ of prohibition, or to authorize him to disobey the orders of the circuit court as to transmitting the papers in a case appealed from the county court. (Page 339.)
7. **SAME—WHEN WRIT GRANTED.**—The writ of prohibition is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that would be done by such usurpation. (Page 339.)

Prohibition to Jackson Circuit Court; *Charles Coffin*, Judge; writ refused.

STATEMENT BY THE COURT.

This is an application for a writ of prohibition directed to the judge of the circuit court of Jackson County. The application is made by J. S. Jones, clerk of the county court of Jackson County. The petitioner alleged that he was county clerk; that three-mile petitions had been filed with him as such clerk; that the county court of Jackson County had made an order prohibiting the clerk of that court from permitting any person to inspect the three-mile petitions until the further orders of the county court; that said order was still in force; that thereafter the three-mile petitions by C. West and others were presented to the county court for its action, and the same were heard by the court, and the court granted the prayers thereof. That, after the order had been made, A. D. Bailey and H. C. Sanders filed a motion asked to be made parties to the prohibitory proceedings for the purpose of resisting the order, and the court denied the order for the reason that the county court had already given its decision and granted the prayer of the petitions; that thereafter A. D. Bailey and H. C. Sanders filed in the county court a paper purporting to be a motion asking the court to set aside the prohibitory order and to grant them a rehearing; that the court overruled the motion because neither A. D. Bailey nor H. C. Sanders had been made a party to the prohibitory proceedings, but the court proposed to grant them an appeal from the order refusing to make them parties to the prohibitory proceedings provided they made the proper affidavit therefor; that A. D. Bailey and H. C. Sanders had never appealed from the orders of the county court; that they were never parties to the prohibitory proceedings, and therefore they have no right to view and inspect the papers and petitions in said proceedings, and that the petitioner, the county clerk, was still under the restraint and order of the county court forbidding him to allow any one to view or inspect said three-mile petitions.

The petitioner further alleged that thereafter A. D. Bailey and H. C. Sanders appeared before the clerk of the circuit court of Jackson County in vacation, and secured from the said clerk a purported order for appeal from the prohibitory order of the county court in the matter of C. West and others; that thereafter A. D. Bailey and H. C. Sanders filed a paper in the cir-

cuit court of Jackson County purporting to be a motion for a rule on the county clerk of Jackson County, petitioner herein, to bring up the papers, books, etc., in the prohibitory proceedings in the county court in the matter of C. West and others, for use in the purported appeal allowed by the circuit clerk to A. D. Bailey and H. C. Sanders; that the petitioner herein filed his response to the purported motion for rule on him to bring up the papers, petitions, books, etc, and in his response he set up the order of the county court prohibiting him from allowing said petitions to be inspected by any person whomsoever, except parties in interest, and that said order was still in force; that, as A. D. Bailey and H. C. Sanders had been declared by the county court not to be parties in interest, they were not entitled to see or inspect the petitions; that in his response to the motion for rule the petitioner herein pleaded to the jurisdiction of the circuit court over said matter of the prohibitory proceedings under the purported appeal allowed by the clerk of the circuit court in vacation as above mentioned. The petition further alleged that the purported motion for rule was granted, and that the circuit judge, in ruling upon said purported motion, declared his intention to compel the county clerk, petitioner herein, to respond to the rule, and announced that, if petitioner refused to comply with the order to bring up the papers, etc., he would be confined in jail.

Petitioner then alleged that the circuit court was without jurisdiction to proceed under the purported appeal granted by the circuit clerk, and is proceeding to exercise jurisdiction notwithstanding, in making the rule on petitioner and in holding him to be in contempt of the court, should he refuse to comply with the rule. The petitioner then set forth that he would be in contempt of the order of the county court above mentioned if he did comply with the rule and order of the circuit court, and would be subject to fines for contempt by the county court.

The petitioner alleged that he had no adequate remedy by appeal from the order of the circuit court if he refused to obey same. He therefore prayed for a temporary restraining order against the circuit court proceeding in the matter until his petition could be heard, and upon final hearing that the circuit court be prohibited from proceeding under the purported appeal of A. D. Bailey and H. C. Sanders, in the prohibitory proceed-

ings instituted by C. West and others. Upon the presentation of this petition to one of the judges in vacation asking a temporary restraining order, he fixed the time for the final hearing of the petition on September 26, 1910, by the full court, and directed notice to be given to the judge of the circuit court of Jackson County of the petition and the final hearing thereof on the above day, and in the meantime granted a temporary restraining order, under section 5161 of Kirby's Digest, to prevent any injury to the petitioner until his petition could be decided. On the day set for the final hearing the circuit judge for the Jackson Circuit Court filed his demurrer and response to the petition. The demurrer set up, first, that a judge of this court had no jurisdiction in vacation to prohibit the Jackson Circuit Court from proceeding to hear the case pending before him fully upon its merits on the appeal; second, that this court had no jurisdiction to prohibit the circuit court from proceeding to hear the case pending before it on appeal upon its merits.

The response set forth that an appeal in due form of law was taken and granted by the clerk of the circuit court of Jackson County pursuant to sections 1487 to 1492 of Kirby's Digest, inclusive; that notice of said appeal was duly served upon C. West for himself and others as to the appeal, and notice was also given ten days before the beginning of the term of this court to J. S. Jones as county clerk that a rule would be asked upon him to make a transcript of all the original papers, etc., according to section 1489 of Kirby's Digest. Thereupon upon petition for such rule upon the county clerk the matter was taken under consideration for some time, and it was stated by the appellants to the circuit court that they expected to show by evidence at the proper time the facts which appear in the affidavit of M. M. Stuckey, which is attached to the response. The respondent then announced his ruling to the effect that the rule should go for the whole record and original papers to come up before the circuit court. The rest of the response contains the reasons of the circuit judge as to why he thought the rule should go, and cites authority which in his view supported his decision, but it is unnecessary to set forth more of the response.

O. W. Scarborough, John B. McCaleb, Ira J. Mack and Jones & Campbell, for petitioner.

Bailey and Sanders were not parties to the original proceedings, and from the order of the county court refusing to make them parties after it had granted the prohibitory order, they had the right of appeal, but did not. They had no right of appeal from the prohibitory order, and neither the county court, circuit clerk nor circuit court could grant an appeal to them. 52 Ark. 99; 71 Ark. 84; 20 Ark. 561; 28 Ark. 480; 91 Ark. 595; 85 Ark. 304; 77 Ark. 586.

The circuit court acquired no jurisdiction, and prohibition is the proper remedy. 155 U. S. 524; 91 Ark. 527, 533; 1 Black on Judgments, § 278; *Id.* § 218; 73 Ark. 66.

Respondent, pro se.

1. Demurs to the petition because (1) a judge of this court, and (2) the court, has no jurisdiction or authority to issue the writ or to restrain, enjoin or prohibit the circuit court or respondent from proceeding to hear the case fully upon its merits on the appeal.

2. It was proper to issue a rule against the petitioner to produce and file the original papers. When an appeal is taken, the whole record is to be sent up to the circuit court. Kirby's Digest, § 1489; 91 Ark. 85.

3. Neither this court nor any of its judges has power to grant an injunction unless it be an ancillary injunction in aid of its appellate jurisdiction. 39 Ark. 82. The court, and not an individual member thereof, has power to hear and determine mandamus, and *other remedial writs*. *Id.* Authority to review or set aside an order or judgment of a circuit judge is supervisory and is invested exclusively in the Supreme Court, not in any judge thereof. 122 S. W. (Ark.), 631. The writ of prohibition is never granted unless the inferior court has clearly exceeded its authority, and then only when the party applying for it has no other protection. 33 Ark. 191.

Wood, J., (after stating the facts). 1. Under section 4, article 7, of the Constitution of Arkansas the Supreme Court has "a general superintending control over all inferior courts of law and equity;" its jurisdiction over these courts is appellate and supervisory. "In aid of its appellate and supervisory juris-

diction, it shall have power to issue writs of * * * prohibition." *Carr v. State*, 93 Ark. 585. This court may issue writs of prohibition by virtue of its superintending control over inferior courts and in aid of its supervisory jurisdiction over these courts, when they are proceeding without jurisdiction. *Reese v. Steel*, 73 Ark. 66; *Hanger v. Keeting*, 26 Ark. 57; *Russell v. Jacoway*, 33 Ark. 191.

2. It appears from the petition and the exhibits thereto and the allegations of the response that an appeal had been granted by the circuit clerk to "A. D. Bailey and H. C. Sanders in the matter of C. West and others, praying for an order prohibiting the sale of liquors, etc., within three miles of the public school house on block No. 3 of Hirsch's Second Addition to Newport." This appeal was granted by the clerk of the circuit court of Jackson County under the authority of section 1487 of Kirby's Digest, which provides:

"Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court, at any time within six months after the rendition of the same, either by the court rendering the order or judgment or by the clerk of the circuit court, with or without supersedeas, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from, or the clerk of the circuit court, shall forthwith order an appeal to the circuit court, at any time within six months after the rendition of the judgment or order appealed from, and not thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him."

In the order granting the appeal the circuit clerk directed the clerk of the county court "to forthwith make a transcript of all the proceedings, and transmit the same, together with all papers, books, etc., now on file in his office in said cause, above-mentioned, to the Jackson Circuit Court. Under section 1489 of Kirby's Digest, after the appeal had been granted by the clerk of the circuit court, the clerk of the county court had

no option or discretion in the matter. His duty, in the language of the statute, was to "transmit all of the original papers and a transcript of the record entries in the cause to the clerk of the circuit court." The appeal having been granted under the statute, it was wholly immaterial, so far as the jurisdiction of the circuit court was concerned, whether the appeal was properly or improperly granted.

By virtue of the appellate jurisdiction given it over the county court (art. 7, sec. 14, Const.), the circuit court had the power to inquire into the subject-matter of the appeal from the county court that had been granted by the circuit clerk under the authority of section 1487, *supra*.

The circuit court, by virtue of its appellate jurisdiction, had power to determine whether it had jurisdiction to proceed to hear the cause on appeal. The question of its own jurisdiction would be for the circuit court itself to pass upon, *in limine*. It was clearly within the power, and was the province and duty, of the circuit court to issue the rule on the clerk of the county court to bring up all the papers in the cause in which the appeal had been granted by the circuit clerk. This the circuit court could and should have done to enable it to determine whether it had acquired jurisdiction to proceed in the cause. It could not have intelligently passed upon the questions presented without having all the papers before it.

When an appeal is taken, the whole record and all the original papers should be sent to the circuit court. Section 1489, *supra*. See also *Williamson v. Rutherford*, 91 Ark. 85.

As to whether or not the appeal had been erroneously granted by the clerk of the circuit court, and whether or not A. D. Bailey and H. C. Sanders were parties to the prohibitory proceedings in the matter of C. West and others, were questions for the determination of the circuit court in deciding as to whether it had jurisdiction to proceed to try the cause on appeal. Bailey and Sanders claimed that they were parties to the prohibitory proceedings. Whether they were or not was a question for the circuit court in determining its jurisdiction. If the court erroneously decided the question as to its jurisdiction to proceed with the cause, the remedy to the party aggrieved was by appeal. *Kastor v. Elliott*, 77 Ark. 148.

While the petitioner herein was not a party to the record, and hence could not have appealed, still an erroneous decision as to jurisdiction could in no manner have affected him. It was his duty to obey the order of the circuit court; and if by so doing he had been adjudged guilty of contempt by the county court, such judgment of the county court would have been void, and petitioner's remedy against it adequate and complete.

The writ of prohibition "is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation." *Russell v. Jacoway*, 33 Ark. 191. See *Weaver v. Leatherman*, 66 Ark. 211; *Reese v. Steel*, 73 Ark. 66.

Petitioner had no right to the writ of prohibition, and his application for such writ is therefore denied, and his petition dismissed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. HOLMES.

Opinion delivered October 31, 1910.

1. CARRIERS—INJURY TO PASSENGERS—INSTRUCTION.—Where, in an action for injury to a passenger in embarking on a train, it was unnecessary, according to undisputed testimony, for the train to start with a jerk, an instruction which submitted to the jury whether the train was started with a jerk of unnecessary violence was too favorable to the railroad company. (Page 342.)
2. APPEAL AND ERROR—WHEN INSTRUCTION HARMLESS.—An instruction which left the jury to fix damages at large, without being controlled by the evidence, was not prejudicial if the verdict was clearly not excessive. (Page 343.)
3. DAMAGES—EXCESSIVENESS.—An award of \$2,500 for the loss of an arm which for two-thirds of its length was "crushed all to pieces" is not excessive. (Page 343.)

Appeal from Desha Circuit Court; *J. Bernhardt*, Special Judge; affirmed.

STATEMENT OF THE COURT.

The appellee, according to the evidence of himself and other witnesses, was in the act of boarding one of appellant's combination freight and passenger trains at Watson station for the purpose of taking passage to Yoncapin. Appellee had mounted the steps, and had reached the platform, and was "fixing to go in the door of the coach" when the train made a "bump," "a big bump," "a hard coupling," a "jerk," "considerable of a jerk," an "awful hard jerk," as the witnesses for appellee variously describe it. This bump or jerk threw appellee from the platform to the ground. Appellee had under his arm a package of beef. As he fell, his arm struck the rail, and the train ran over it, crushing the "lower two-thirds of his arm and hand all to pieces," so that it was necessary to amputate same. The train "was standing perfectly still" until appellee reached the platform and "got to where he was going in the door," when it started.

Appellee was attended by the surgeon for about twenty-two days. Appellee had a pint of whisky in his pocket. He did not know how many drinks he had taken the evening before his injury, but he had taken only one drink—a bottle of beer—that morning, and was sober. The above are substantially the facts, as the jury might have found them in favor of appellee. Appellee sought and recovered judgment against appellant in the sum of \$2,500. He alleged in his complaint that appellant "carelessly and negligently started its train with a sudden and violent jerk," causing the injury above described. Appellant denied the allegations, and set up that appellee did not become a passenger on its train, "but that he undertook to board the train after it left the station and while it was in motion," and that appellee was thus injured through his own negligence.

The testimony of witnesses on behalf of appellant tended to prove that appellant's train stopped at Watson on the day appellee was injured some ten or fifteen minutes for passengers to get off and on; that the train had begun to move, and had gone about ninety feet before appellee attempted to get on same; that appellee waited at a saloon until the train started up, then he was seen approaching, running to catch the train.

"He grabbed the grab iron with his right hand and missed it, and attempted to step up and missed the step, and fell in under there," as one of the witnesses testified.

There was testimony tending to prove that appellee at the time appeared to be under the influence of liquor.

Witnesses on behalf of appellant testified that the train did not start with a jerk, that the train was light, and that it was unnecessary that it should start up with a jerk.

The above testimony on behalf of appellant tended to prove that appellant was not negligent, and that appellee was negligent. Other facts stated in opinion.

W. E. Hemingway, E. B. Kinsworthy and Bridges, Wool-dridge & Gantt, for appellant.

1. The mere fact that there was a jerk in starting the train was not sufficient to show negligence. It was a mixed freight and passenger train. 3 Hutchinson on Carriers, (3 ed.), § 1217; 4 Elliott on Railroads, § 1589; 44 S. W. 213; 71 Ark. 590; 82 Ark. 393; 83 Ark. 22. A carrier is required to try to protect its passengers from such dangers only as it may reasonably anticipate. 88 Ark. 12; 86 Ark. 325. It owes no duty to a belated passenger to delay the train after allowing a reasonable time to get aboard. 102 N. Y. 280; 54 Ark. 25; 87 Ark. 581; 92 Ga. 293. After such reasonable time the conductor is not required to examine to see that all intending passengers have boarded the train. 24 Am. & Eng. R. Cas. (N. S.), 923, note; 6 Cyc. 613; 28 Mich. 440; 73 Ark. 548; 50 S. W. 581.

2. The testimony of Dr. McRae that he was told to take charge of plaintiff after the accident was improperly admitted. 1 Enc. of Evidence, 552; 65 Ark. 52; 78 Ark. 381; *Id.* 147; 89 Ark. 556; 70 Ark. 179.

3. The fourth instruction errs principally in directing the jury that, if they found certain things to be true, "then in this case you should find for the plaintiff in some amount, not exceeding \$5,020." 58 Ark. 136; 87 Ark. 123; 69 Ill. 426; 83 Ill. 440; 174 Ill. 398.

4. The verdict is excessive.

X. O. Pindall, for appellee.

1. Starting a train with jerks and jars of unusual and unnecessary violence is held to be negligence on the part of the company. 82 Ark. 393; 83 Ark. 22.

2. If the testimony of McRae complained of was improper, the objection to it was merely technical, and the testimony was harmless. Appellant should have asked a proper instruction concerning it, or should have pointed out to the court its injurious effects; 13 Ark. 344; 94 Ark. 407; 89 Ark. 24.

3. The amount sued for was reduced by the plaintiff, without objection from defendant, before the jury were instructed. The fourth instruction was neither erroneous nor hurtful. 92 Ark. 436. Moreover, there was no error pointed out to the trial court. 124 S. W. 247; 89 Ark. 82; 66 Ark. 46; 87 Ark. 123.

WOOD, J., (after stating the facts). Witnesses for appellant testified that it was unnecessary in the proper operation of the train to start same with a jerk. Then, if the train did start with a jerk, as the witnesses for appellee testified, this was evidence of negligence on the part of appellant, and if the injury of appellee was the result of this negligence, as the evidence tended to prove, then appellant was liable. The questions of negligence and contributory negligence were properly submitted for determination by the jury and upon correct declarations of law.

This court has defined the duty of carriers to passengers on combination freight and passenger trains, and also the duty of passengers on such trains with reference to their own safety. We need not repeat here the rules applicable in such cases.

The instructions of the court were in harmony with the doctrine announced in the following cases: *St. Louis, I. M. & S. Ry. Co. v. Hartung*, 95 Ark. 220; *Arkansas S. W. Ry. Co. v. Wingfield*, 94 Ark. 75; *St. Louis S. W. Ry. Co. v. Jackson*, 93 Ark. 119; *Arkansas Central Rd. Co. v. Janson*, 90 Ark. 494; *St. Louis, I. M. & S. Ry. Co. v. Cobb*, 89 Ark. 82; *St. Louis, I. M. & S. Ry. Co. v. Brabbson*, 87 Ark. 109; *Pasley v. St. Louis, I. M. & S. Ry. Co.*, 83 Ark. 22; *Rodgers v. Choctaw, O. & G. Ry. Co.*, 76 Ark. 520.

Since, according to the undisputed evidence of witnesses for appellant, it was unnecessary to start this particular train

with any jerk at all, the instructions at the instance of both parties submitting the question to the jury as to whether the jerk, if any, was a "sudden, violent and unusual" one, or of "unusual and unnecessary violence," were more favorable to appellant than otherwise. Instruction number four, given at the instance of appellee, after declaring the duty of carriers to passengers on mixed freight and passenger trains, and that the passenger assumed the risk incident to the proper operation of such a train, continued as follows:

"And, so in this case, if you find from the evidence, by a fair preponderance thereof, that Webb Holmes was injured by a sudden, violent and unusual jerk in the starting of one of the defendant's trains, which said jerk amounted to more than a necessary incident in the starting of such train, and that he was at the time a passenger on said train, free from negligence on his part which could have contributed to his injury, and within his rights as a passenger, then in this case you should find for the plaintiff in some amount not exceeding \$5,020."

Counsel urged, as their "principal objection" to this instruction, "that it leaves the damages at large without being in any way controlled by the evidence." Conceding this, the amount of the verdict shows that it was not excessive, and therefore the appellant was not prejudiced. As to damages, the only issue was as to the amount of damage appellee sustained by way of pain and suffering and medical attention.

There was no controversy as to the character of appellee's injury, nor as to the sum expended for medical services. The verdict was less than half of the amount asked in the complaint. Even if the instruction offends the rule announced in *Fordyce v. Nix*, 58 Ark. 136, and *St. Louis S. W. Ry. Co. v. Myzell*, 87 Ark. 123, we can only reverse for errors that are prejudicial. The sum of \$2,500 for the pain and suffering incident to the loss of an arm that, for two-thirds of its length, "had been crushed all to pieces," is certainly not exorbitant.

After the injury to appellee the conductor and division superintendent of appellant called a surgeon and asked him to "rush on" and "to take charge of" the injured man and "render all necessary means he could." This conduct did not tend in the slightest degree to prove that the injury to appellee was caused

through appellant's negligence. It was but the manifestation of commendable sympathy for one in distress and the expression of a desire to relieve his suffering. It would be unheard of to construe these humane impulses of the agents of appellant as admissions of negligence in causing the injury to appellee. Therefore the doctrine of *St. Louis, I. M. & S. Ry. Co. v. Walker*, 89 Ark. 556; *St. Louis S. W. Ry. Co. v. Plumlee*, 78 Ark. 147, *Prescott & N. W. Ry. Co. v. Smith*, 70 Ark. 179, has no application.

We find no reversible error, and the judgment is therefore affirmed.

STEADMAN v. STATE.

Opinion delivered October 31, 1910.

CERTIORARI—PRACTICE.—The error of rendering judgment in favor of a plaintiff whose death occurred before the trial should be corrected on appeal, and can not be reached by certiorari, unless it appears that petitioner unavoidably lost his right of appeal.

Certiorari to Union Circuit Court; *George W. Hays*, Judge; writ quashed and judgment affirmed.

Moore, Warren & Smith, for appellant.

The owner of the horse having died before the trial, the court was without authority to assess the statutory damages against appellant in favor of the owner of the horse. 23 Ark. 152; 56 Ark. 324; 11 Ill. 211; 32 Ill. App. 226; 6 Mo. App. 135; 39 Ark. 104; 51 Ark. 83. The right to enter judgment for the penalty abated at the death of the owner. 1 Cyc. 47, 48, note 51; *Id.* 50; 41 Ark. 295.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

Certiorari does not lie in this case. 73 Ark. 606; 61 Ark. 605; 62 Ark. 196; 39 Ark. 347; *Id.* 399; 69 Ark. 587; 37 Ark. 318; 56 Ark. 80; 70 Ark. 71; 92 N. C. 562; 43 Ark. 32; *Harris*, Certiorari, § 416.

WOOD, J. The question presented by this petition is whether a judgment rendered in favor of a plaintiff whose death, according to the evidence in the bill of exceptions, occurred before the trial, can be reversed and set aside on certiorari.

Certiorari will not lie to correct errors or irregularities that could have been corrected on appeal. *Reese v. Cannon*, 73 Ark. 606; *Salem v. Colley*, 70 Ark. 71; *Grinstead v. Wilson*, 69 Ark. 587; *Pine Bluff, etc., Co. v. Pine Bluff*, 62 Ark. 196; *Sumerow v. Johnson*, 56 Ark. 85; *Pettigrew v. Washington County*, 43 Ark. 33; *Haynes v. Semmes*, 39 Ark. 399; *Baskins v. Wylds*, 39 Ark. 347; *Payne v. McCabe*, 37 Ark. 318.

The error complained of here was an irregularity that did not appear on the face of the record itself, but was made to appear from the testimony in the case preserved in the bill of exceptions. The error was such as could have been corrected on appeal. There is no showing that the petitioner herein has unavoidably lost his right of appeal.

Judgment affirmed.

PINE BLUFF CORPORATION v. TONEY.

Opinion delivered October 31, 1910.

WATERWORKS—DUTY AS TO LAYING SERVICE PIPES.—Where a water company obligated itself to supply water to the city and its inhabitants, and acquired the right to use the streets, alleys, sidewalks, and public grounds of the city for placing "mains, hydrants and other structures and devices requisite for the service of water," it was its duty to lay the service pipes from the mains to the curb line without charge to the consumer.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; affirmed.

Bridges, Wooldridge & Gantt, and *A. R. Cooper*, for appellant.

1. The ordinance of 1887 is a contract which comes within the protection of that clause of the Federal Constitution which prohibits the passage of laws impairing the obligations of con-

tracts. 172 U. S. 1, 9; 70 Ark. 300, 303; 208 U. S. 590; 181 U. S. 142; 189 U. S. 207. The contract does not place the burden of installing service pipes upon the water company. If it had been intended that appellant should bear this burden, it would have been expressly set out in an appropriate clause in the contract. It is the duty of the consumer to install, maintain and repair the service pipe from the main to the curb line. Farnham on Waters and Water Rights, 752, 879; 4 N. D. 478, 61 N. W. 1030; 11 S. W. 432, 88 Ky. 467; 94 Pac. 1080; 79 N. W. 249; 35 Pac. 693; 39 Pac. 562.

2. If the contract is ambiguous as to the duty to install and repair the service pipes in question, then it should be construed under the same rules of construction as are contracts between individuals, *i. e.*, so as to arrive at the intention of the parties, and with due regard to the custom of the country at the time of making the contract, taking into consideration the construction placed upon the contract by the parties themselves as evidenced by their acts. 80 Ark. 108; 28 Cyc. 679, 680; 131 N. Y. 24; Farnham on Waters and Water Rights, 697; 35 S. W. 733; 53 O. 278; 34 Mo. App. 49; 28 N. Y. Supp. 614; 46 Mo. 121; 17 La. Ann. 190; 16 L. R. A. 485; 55 S. W. 1003; 55 Ark. 414; 52 Ark. 65; 78 Ark. 202; 88 Ark. 363; 46 Ark. 222; *Id.* 210; 58 Ark. 565.

3. The city, having for twenty-two years permitted appellant and its grantors to charge for the installation and repair of service pipes, or to have same installed and maintained at the consumer's own expense, is estopped to compel appellant to render this service free of charge. 92 Ark. 546; 87 Ark. 389; 47 Ark. 269; 76 Fed. (C. C. A.) 271.

4. The city council has no power to enact an ordinance determining who shall pay for the installation and maintenance of service pipes by water companies. 70 Ark. 4; 20 Ark. 351.

W. B. Sorrells, for appellees.

1. There is no ambiguity in the contract; but if it was doubtful or ambiguous, it would be construed in favor of the public as against the appellant. 19 Cyc. 1459, and authorities cited.

2. By section 1 of the franchise appellant assumed the duty of supplying the inhabitants of the city with water and

required it to lay mains, structures and devices requisite for this purpose. It must lay all necessary water pipes within its franchise limits at its own expense. 7 Idaho 155; 30 Am. & Eng. Enc. of Law, 439; 112 S. W. 820; 24 L. R. A. (N. S.), 487; 104 Pac. 670; 92 Pac. 533; 3 Ch. (1894), 513; 27 Am. & Eng. Enc. of Law, 419.

3. The inhabitants would have no right, under the franchise or under the statute law, to lay water service pipes in the streets. See section 15 of franchise; Kirby's Digest, § 2932; 87 Me. 287.

BATTLE, J. A controversy arose between the city council of Pine Bluff and the Pine Bluff Corporation, the owner and operator of the water works in that city, as to whether it is the duty of the latter, under its contract with the city, to construct and maintain free of charge the service pipes, that is, the pipes constructed between the water mains in the street and the curb line between the street and private property, to convey water from the main. The city council, to enforce its views, passed an ordinance requiring the "water company"—Pine Bluff Corporation—to construct and maintain service pipes, after certain notice given, at its own expense, providing that the latter shall be subject to a certain penalty for a failure to do so. The water company brought suit to enjoin the enforcement of the ordinance, setting forth its contract with the city, and contending that under its contract it is the duty of the consumer to bear the expense of constructing and maintaining the service pipes. The defendant answered, and upon hearing the court found that it was the duty of the plaintiff to construct and maintain "service pipes from the water mains in the street to the curb line between the street and the property abutting or adjacent to said street free of charge," and so decreed, and plaintiff appealed.

The contract between the parties was an ordinance of the city council, accepted and acted upon by the Pine Bluff Water & Power Corporation. Section 1 of that ordinance is as follows:

"Section 1. There is hereby granted to the Pine Bluff Water & Power Company, its successors or assigns, the privilege of establishing and maintaining and operating water works within and near the city of Pine Bluff, Arkansas, for thirty years

from and after the passage of this ordinance (unless purchased by said city in the manner hereinafter provided) and for supplying the city and the inhabitants thereof, and of the adjacent territory, water pumped, clarified, by settlement or filtration, if needed, for public and private uses, and to use the streets, alleys, sidewalks and public grounds of the city of Pine Bluff, within its present and future corporate limits, for placing and taking up and repairing mains, hydrants and other structures and devices requisite for the service of water."

Section 5 is as follows:

"Sec. 5. There shall be no unreasonable or unnecessary obstruction of the streets, alleys, sidewalks or public grounds of said city by the said water company in constructing the works and in placing, taking up and repairing any mains, hydrants, structures and devices requisite for the service of water, and the said grantee, or his assigns, after using said streets, alleys, sidewalks and public grounds, shall restore them within a reasonable time, as nearly as practicable to former conditions, and shall hold the city harmless from any and all damages arising from any negligence or mismanagement of said water company or their employees in construction, extending and operating said works. Danger lights are to be kept burning at night along the line of street excavations, and temporary barricades are to be erected at night at end of trenches and at all streets and alleys where they cross said excavations."

Section 13 is as follows:

"Sec. 13. It is further provided and ordained that the contractors under this ordinance, their associates, successors or assigns may charge and collect, as their annual water rates, a tariff of prices equal to but not exceeding the average rates charged by the cities of Kansas City, Mo., St. Louis, Mo., Louisville, Ky., Nashville, Tenn., and Cincinnati, O. The meter rates shall range from five and one-half to eleven and one-half cents per one hundred gallons, daily consumption. The rate shall be payable quarterly or monthly in advance, at the option of the said contractors, their associates, successors and assigns."

After the Pine Bluff Water & Power Company, mentioned in the ordinance, accepted and acted upon it, and it thereby

became a contract between the company and city, the plaintiff acquired all the rights, privileges, franchises and property of the company, and became its successor. Thereafter the city council passed an ordinance requiring the plaintiff "to extend its service pipes from its main pipes in the various streets in the city of Pine Bluff, Arkansas, to the curb lines of said streets when so requested to do by the owner, or the owner's agent, of property abutting on said street," etc., and "to repair all service pipes at its own expense where the leak or failure is between its main pipes and the curb line of the property owned," etc. The last ordinance mentioned was amended by the city council of Pine Bluff; but under our construction of the contract of the parties it is unnecessary to set it out or consider it.

Is it the duty of appellant to construct and maintain the service pipes at its own expense, free of charge?

By section 1 of its contract it assumed the duty of supplying the city and the inhabitants thereof with water and acquired the right "to use the streets, alleys, sidewalks, and public grounds of the city of Pine Bluff, within its present and future corporate limits, for placing and taking up and repairing mains, hydrants and other structures and devices requisite for the service of water." The duty to furnish the city and inhabitants with water carried with it the duty to do and perform what was necessary to be done to place the company in a position where it could furnish the water. To do that the contract, section 1, expressly authorizes it "to use the streets, alleys, sidewalks * * * of the city of Pine Bluff * * * for placing and taking up, and repairing mains, hydrants and other structures and devices requisite for the service of water"—that is to say, the delivery of water to the inhabitants or city. The duty is assumed, and the power is given, by the contract to perform it. The property owner, the inhabitant or consumer has no right to lay the service pipes in the streets and connect them with the water company's mains, but this power is expressly given to water company, in connection with the duty it assumes, and to no one else, which implies that it shall lay the service pipes, at its own expense, for all of which the consumer is required to pay for the water furnished at certain rates specified in the contract. If it was not the intention of

the contract that the water company should lay the service pipes, why did the city council give it the power to do so, and withhold it from the inhabitant? It evidently intended that the water company should do so, free of charge, because it fixes the compensation to be paid by the consumer for services rendered him and says nothing about compensation for service pipes. How was it to render the services it undertakes without laying the service pipes, and where is the authority to collect from the consumer more than he is required by the contract to pay? There is none. *Pocatello Water Company v. Stanley*, 7 Idaho 155; *International Water Company v. El Paso*, 112 S. W. 820; *Bothwell v. Consumers' Company*, 24 L. R. A. (new series), 487.

Decree affirmed.

GRAFF v. LENA LUMBER COMPANY.

Opinion delivered October 31, 1910.

ESTOPPEL—ACQUIESCENCE.—Where, with the knowledge and consent of merchants, lumber was purchased in their name and upon their credit for another, and they never notified the seller that they were not buying the lumber, they are estopped to deny that they were purchasers of such lumber.

Appeal from Lawrence Chancery Court; *George T. Humphreys*, Chancellor; affirmed.

W. E. Beloate and *McCaleb & Reeder*, for appellants.

1. Before one can be held liable for services rendered, there must have been at least an implied contract. 128 S. W. 1036. In order that an acceptance may be effective after a refusal, the offer must have been renewed. 119 U. S. 149; Clark on Contracts, 53.

2. Appellants are not estopped. There was no contract, express or implied, no consideration to appellants, which fact was known to appellee, and the appellee was not misled to its injury. 16 Cyc. 744 and note 37; 33 Ark. 646. Where all facts are known to both parties, neither can claim an estoppel against the other. 11 Am. & Eng. Enc. of Law, 434; 16 Cyc.

730. The letters of appellants, and their credit, must have induced the sale and have been relied upon by appellee. 11 Am. & Eng. Enc. of Law. 436; 56 Ark. 380. Delivery of the bill of lading and subsequent letters could not create an estoppel. 53 Ark. 196. See also, 39 Ark. 134; 50 Ark. 129.

John W. & Joseph M. Stayton and Coleman & Lewis, for appellee.

1. It is plain that the order was made with the knowledge the consent of Graff Brothers, and that they recognized their liability. They had the opportunity to refuse to accept the lumber when it was shipped, but waived that right by accepting the lumber, and are liable for the price. 60 Ark. 613; 148 Fed. 153; 16 Cyc. 805; 87 Ark. 389; 83 Ark. 440.

2. Appellants are estopped to deny their liability. 80 Ark. 23; 33 Ark. 468; 35 Ark. 365.

BATTLE, J. This suit was brought by the Lena Lumber Company against Graff Brothers and others in the chancery court for the Eastern District of Lawrence County to recover a judgment for the sum of \$400 and interest.

Plaintiff's complaint is as follows: "The Lena Lumber Company states that it is a corporation organized under, and doing business in, the State of Arkansas, and for cause of action against the defendants, J. L. Park, J. N. Beakley, Ben Graff and Fritz Graff, partners, and doing business as Graff Brothers, states that on or about the 18th day of September, 1906, the Walnut Ridge School District of Walnut Ridge, Arkansas, entered into a contract with the defendant J. L. Park to build and erect in the town of Walnut Ridge a schoolhouse for the use of said district, and in the building and erection of said building, and in the business matters pertaining thereto, J. N. Beakley, who was the brother-in-law of the defendant Park, acted as his clerk and bookkeeper, and attended to many matters pertaining thereto. That the defendants, Graff Brothers, are merchants and doing business in the said town of Walnut Ridge, and Ben F. Graff, the senior member thereof, was and is the president of said board of directors of said district. That the said J. N. Beakley, acting for the said Park, made some arrangement, the details of which are unknown to this plaintiff, with said Graff Brothers, by which he could use their name in

ordering material for the construction of said building, and, with the knowledge and consent of the said Graff Brothers, said Beakley, using the name of said Graff Brothers, did make application to purchase lumber to be used in the construction of said buildings, and thereafter, in the name and with the knowledge of said Graff Brothers, did contract for the delivery to Graff Brothers the lumber * * * of the value of \$930.45; that said lumber was shipped by the plaintiff to said Graff Brothers, and the same was afterwards delivered to them, and upon said lumber the plaintiff has received the sum of \$530.45, leaving a balance due thereon of the sum of \$400, with interest, all of which is past due and unpaid. That the said Graff Brothers deny that they had any interest in the said contract, did not order the same, nor receive the same; and dispute and deny that the plaintiff has any right of action against them therefor, but admit that said Beakley did use their name for the purpose aforesaid. The plaintiff states that it had no knowledge of the arrangement between said Beakley and said Graff Brothers, and presumed it was in fact dealing with Graff Brothers, and not aware of the connection of defendant Beakley with said transaction until long after said lumber was shipped, delivered and used in said building. Plaintiff therefore prays that the said Park, the said Beakley and the said Graff Brothers be made parties defendant herein, and each be required to make answer hereto; that plaintiff have judgment against all of the defendants for the said balance due it, amounting to the total sum of \$400, with interest from the date of shipment, and for costs and for all proper relief."

The defendants, Graff Brothers, answered as follows: "Come Ben F. Graff and Fritz Graff, partners, doing business as Graff Brothers, and for their separate answer to the plaintiff's complaint, and admit that the Walnut Ridge School District of Walnut Ridge, Arkansas, entered into a contract with J. L. Park for the erection of a school building, and that J. N. Beakley was the brother-in-law of the said J. L. Park; they admit that they are in the business of selling wagons, harness, blacksmithing and such business as connected therewith, but allege that they were not in the lumber business, nor had anything to do with it. They admit that B. F. Graff was a member of the school board at the time. They state that J. L. Park

or J. N. Beakley had no standing as merchants, and that J. N. Beakley was given by B. F. Graff permission to inquire of the plaintiff herein in the name of Graff Brothers, for the prices of lumber to be bought by J. L. Park. That such limited authority was known to the plaintiff, and when the lumber was ordered it was, with the consent of the plaintiff, shipped in the name of these defendants, without these defendants' knowledge or consent, and shipped solely upon the credit and promise of J. L. Park and J. N. Beakley, and not upon the credit of this defendant. Wherefore, defendants, Graff Brothers, having fully answered, they ask to be discharged with costs and all other equitable relief."

The court found that Graff Brothers authorized J. N. Beakley, the agent of J. L. Park, "to order certain lumber in their name from the plaintiff," of the value of \$930.45, to be used in building a certain schoolhouse, for which the sum of \$530.45 has been paid, leaving due on the 12th of September, 1907, the sum of \$400, and that Graff Brothers are liable to plaintiff for that sum; and the court rendered a decree in favor of the Lena Lumber Company against Graff Brothers for \$400 and 6 per cent. interest from the 12th day of September, 1907. Graff Brothers appealed.

On or about the 18th day of September, 1906, the Walnut Ridge School District of Walnut Ridge, Arkansas, entered into a contract with J. L. Park to build and erect in the town of Walnut Ridge a schoolhouse. In the building and erection of the schoolhouse lumber was purchased of the Lena Lumber Company in the name of Graff Brothers at the price of \$930.45. The lumber was shipped to them and in their name; the bill of lading was sent to and received by them. The evidence shows that this was done with the knowledge and consent of the Graff Brothers and on their credit. They never notified the lumber company that the lumber was purchased in their name without authority, and that they would not pay for the same; but induced it by their silence and acts to believe that they had purchased the lumber, and were liable therefor. A correspondence in their name, based upon this transaction, continued for a period of three or four months, and they received the letters addressed to them, knowing that they were mailed to them by the

lumber company. But they say that they never opened them, and, knowing from the envelopes that they were from the lumber company, they delivered them to the clerk of Park, the contractor. They never sought in due time to correct any misapprehension of the lumber company. The result of their action and silence is they are estopped from denying that they were the purchasers of the lumber and are liable for the purchase money. *Powers v. Phelps*, 33 Ark. 468; *Danly v. Rector*, 10 Ark. 211; *Trapnall v. Burton*, 24 Ark. 371; *Gill v. Hardin*, 48 Ark. 409.

Decree affirmed.

TAYLOR v. GUMPert.

Opinion delivered November 7, 1910.

1. APPEAL AND ERROR—FAILURE TO ABSTRACT EVIDENCE—PRESUMPTION.—Where the evidence adduced in the trial court is not set out in appellant's abstract, the presumption will be indulged on appeal that such evidence was sufficient to sustain the verdict of the jury. (Page 356.)
2. SAME—FAILURE TO ABSTRACT EVIDENCE—PRESUMPTION AS TO INSTRUCTIONS.—Where the appellant neglects to abstract all of the testimony, it will be presumed that the instructions given were based upon competent evidence unless the instructions were inherently erroneous. (Page 356.)
3. LIBEL AND SLANDER—WORDS ACTIONABLE *PER SE*.—Words which tend to disgrace another, and to hold her up to public contempt, and to charge her with the commission of such immoral acts as are criminal, are actionable *per se*. (Page 356.)
4. SAME—RIGHT TO COMPENSATORY DAMAGES.—Where slanderous words are actionable *per se*, the plaintiff is entitled as a matter of law to compensatory damages, and is not required to introduce evidence of actual damages to entitle him to recover substantial damages. (Page 356.)
5. CONTINUANCE—DISCRETION OF TRIAL COURT.—It is only where the trial court has abused its discretion in the matter of continuances that the Supreme Court will reverse the cause. (Page 357.)
6. SAME—ABSENCE OF WITNESSES.—It was not an abuse of discretion to refuse a continuance on account of the absence of certain witnesses where, although the cause was pending for several months, the appellant did not ask for a subpoena for such witnesses until the day before the day set for the trial, nor where the application did not

state whether the witnesses resided in the court's jurisdiction or whether it was probable that their attendance could be procured. (Page 357.)

7. APPEAL AND ERROR—FAILURE TO ABSTRACT TESTIMONY.—It was not an abuse of discretion to refuse a continuance on account of the absence of a witness whose testimony would have tended merely to mitigate the damages recovered by appellee, if appellant has failed to abstract the testimony, so that it cannot be seen whether the testimony was not ample to sustain the amount awarded by the jury, even in view of the testimony of the absent witness. (Page 358.)

Appeal from Drew Circuit Court; *Henry W. Wells*, Judge; affirmed.

R. W. Wilson, for appellant.

Whether there was actual or express malice was a question for the jury, and instructions which take away this question from the jury are erroneous. 56 Ark. 494-501; *Id.* 94-98.

The burden of proving malice is on the plaintiff. *Newell on Slander*, 827, 323; 129 S. W. 807. Where express malice on the part of the defendant is not shown by the evidence, exemplary or punitive damages can not be recovered. 25 Cyc. 536 (b) (1); *Id.* 539 (5); 56 Ark. 94. The award of \$300 for compensatory damages was contrary to the evidence. In estimating compensatory damages the jury should consider all matters relevant to show the extent of the injury done by words; and, without evidence to show injury to plaintiff's reputation, health, business, cost of litigation, or touching future damages, a verdict for compensatory damages is contrary to law. 25 Cyc. 532. The motion for continuance should have been granted. The error of the clerk in issuing the subpoena for the witnesses to appear in a different case, a mistake for which appellant was not responsible, prevented his obtaining their attendance. The court's ruling was contrary to the statute, § 6173, Kirby's Digest, and a clear abuse of discretion. 14 Cyc. 384-5; 10 Ark. 527; 21 Ark. 460; 22 Ark. 166; 42 Ark. 273; 9 Cyc. 172-3; 4 Ala. 303, 310.

Williamson & Williamson, for appellee.

1. The appeal should be dismissed because appellant has failed to abstract the evidence offered by the parties at the trial, without which the court has not before it "such statements from the record as are necessary to a full understanding of all questions presented to the court for decision."

2. There was no abuse of discretion in overruling the motion for continuance. No diligence was shown. 94 Ark. 538; 40 Ark. 114.

3. Uttering words which are slanderous *per se* implies malice, and proof of such uttering is proof of malice such as to justify an award of compensatory damages. 95 Ark. 199, and cases cited. The jury were properly instructed both as to compensatory and punitive damages and as to the burden of proof.

FRAUENTHAL, J. This is an appeal from a judgment awarding damages for slander. It was alleged that the slanderous words were uttered and spoken of and concerning Mrs. Agnes Gumpert, the plaintiff below, and the jury returned a verdict in her favor for \$300 compensatory and \$100 punitive damages. A number of witnesses testified upon the trial of this case, but the appellant has failed to set out the testimony of these witnesses in his abstract. As has been repeatedly held by this court, we indulge the presumption that the testimony adduced upon the trial of a case is sufficient to sustain the verdict of the jury when such evidence is not set out in the abstract. *France v. Shockey*, 92 Ark. 41. The appellant has set out in his abstract of the case all the instructions that were given. In as much as the appellant has failed to abstract the testimony, none of these instructions can be said to be erroneous if they were justified by any evidence that was competent to establish the issue involved in this case, because it will be presumed that such evidence was introduced upon the trial. Upon an examination of these instructions, we do not find that any of them was inherently wrong. In effect, the court instructed the jury that the plaintiff was entitled to recover compensatory damages if the words set out in the complaint were uttered and published by the defendant. These words were defamatory of the plaintiff, and were not only of a nature tending to disgrace and degrade her and hold her up to public contempt and cause her to be shunned, but they charged her with the commission of such immoral acts as under our laws would be criminal. The words were therefore actionable *per se*. *Murray v. Galbraith*, 86 Ark. 50.

Where the slanderous words are actionable *per se*, the plaintiff is entitled as a matter of law to compensatory damages, and is not required to introduce evidence of actual damages to

entitle him to recover substantial damages. In such case the plaintiff need not prove special damages in order to recover substantial damages. *Murray v. Galbraith*, 95 Ark. 199; 25 Cyc. 490.

The instructions relative to punitive damages which were given by the court were not erroneous if they were warranted by testimony introduced at the trial, and we presume that such was the case.

It is urged by counsel for appellant that the court erred in refusing to grant him a continuance. It appears that the complaint in this case was filed on October 6, 1909, and summons thereon was duly served on appellant on October 30, 1909. The court to which the summons was returnable convened on February 14, 1910, and the cause was set for trial for February 18, 1910. On February 18, 1910, the appellant filed his answer, and on the same day filed a motion for a continuance to the following term of the court on account of the absence of witnesses. On February 17, 1910, the appellant applied to the clerk for the issuance of a subpoena for these witnesses, but by error another and different case was named in the subpoena in which the witnesses were summoned to appear. One of the witnesses was served with the subpoena, but it does not appear on what exact date. None of the witnesses thus named in the subpoena appeared at the trial. The testimony which, as set out in the motion, it was expected that these witnesses would give related to the bad character of the plaintiff. This court has repeatedly held that the matter of continuance of causes is ordinarily left to the discretion of the trial court, and that it is only in cases where such discretion has been clearly abused that this court will reverse upon the ground that the lower court erred in refusing to grant a continuance. *Clampett v. State*, 91 Ark. 567; *Miller v. State*, 94 Ark. 538.

In the present case we do not think that due diligence was shown to secure the attendance of these witnesses. The appellant was advised of the institution of this suit on October 30, 1909, and for some days the case was set for trial on the docket of the court for February 18, 1910. He had from October 30, 1909, to February 18, 1910, to prepare for his trial and to take steps to procure his witnesses. He did not ask for the issuance of a subpoena for these witnesses until a day before

the day set for the trial of the case. If error was made in the issuance of the subpoena, such error is attributable to the appellant, rather than to the clerk. A strict degree of care and diligence required the appellant to see that the subpoena was properly issued and delivered to the proper officer for service. *Clampett v. State, supra.* In addition to this, the motion does not state the residence of any of the desired witnesses except Morrison, and it does not appear therefrom whether or not they resided within the jurisdiction of the court or whether it was probable that the attendance of the witnesses could be secured.

The testimony which it was alleged that Morrison would give only related to the bad character of the plaintiff, and therefore it was only competent to mitigate the damages. The testimony adduced upon the trial of this case has not been abstracted, and we can not say that it was not ample to sustain the amounts given by the jury both for compensatory and punitive damages, even in view of the testimony which appellant claims he could have introduced. We can not therefore say that a manifest injustice has been done to the appellant by the refusal to grant him a continuance.

Under all the circumstances of this case, we do not think that it has been shown that the lower court abused its discretion in refusing to continue the case.

The judgment is affirmed.

TILLAR v. REYNOLDS.

Opinion delivered November 7, 1910.

1. ACTIONS—JOINDER.—An action for the benefit of the estate of one alleged to have been wrongfully killed may be joined with an action based upon the same killing brought for the benefit of the widow and next of kin of such deceased. (Page 363.)
2. MASTER AND SERVANT—RESPONDEAT SUPERIOR.—A master who puts a servant in a place of trust or responsibility, or commits to him the management of his business, is responsible where the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances or occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. (Page 363.)

3. DAMAGES—UNLAWFUL KILLING—EXCESSIVENESS.—A verdict awarding to a widow and minor children the sum of \$3,750 for the unlawful killing of their husband and father was not excessive where the deceased was a strong man, with an expectancy of life of 34 years and earning from \$50 to \$60 per month, most of which he contributed to their maintenance and support. (Page 366.)

Appeal from Drew Circuit Court; *Henry W. Wells*, Judge; affirmed.

James C. Knox, for appellant.

1. Two separate and distinct causes of action were set up in the complaint, one for the benefit of the estate and the other for the benefit of the next of kin. The court erred in overruling the demurrer. 53 Ark. 117; 59 Ark. 215. And this error is not cured by the consolidation act of 1905, p. 798.

2. If the deceased died from any other cause than that alleged in the complaint, there can be no recovery. The evidence that he died from the injuries alleged is not sufficient to sustain the verdict. Kirby's Digest, § § 6289-90.

3. There could be no recovery for the benefit of the widow and next of kin, unless it be shown by competent testimony who the next of kin are (which is not shown in this case either in pleadings or proof), and that deceased had an earning capacity. On this point, proof that some time previous to his arrest and conviction he had worked a month and a half at wages of 18 to 20 cents per hour, was not sufficient, in view of further proof that he had not only ceased to work, but had moved away from the place where such wages were earned, to show that he had an earning capacity sufficient to form a basis for a measure of damages in this case.

4. The second instruction errs in holding the employer liable even though the agent or employee goes beyond the strict line of his duty or authority. There has been here not only no ratification by the appellant of the act of the employee, but there was a discharge of his whole duty by giving positive orders to the employee to observe the penitentiary rules for the government of prisoners.

R. W. Wilson, for appellee.

1. The demurrer was properly overruled. There was no misjoinder, and if separate actions had been brought the court

could have consolidated them. Acts 1905, p. 798; 86 Ark. 138; 88 Ark. 124-8; 91 Ark. 51-2; Kirby's Digest, § 6079; *Id.* § 6148.

2. Appellant fails to set out the evidence on which he relies to sustain his contention that the evidence does not support the verdict. For such failure the judgment should be affirmed. 90 Ark. 393. The evidence, the sufficiency of which was left to the jury, establishes beyond question that Gentry unlawfully and unmercifully beat the deceased on the naked body while stretched across a log or sill, on his back and loins, and that such beating over the loins is calculated and likely to produce death, and this evidence is supported by the physical facts, *i. e.*, passing of bloody urine, pains in kidneys and over his loins, his death, and the condition of his body. The jury could rightfully infer that death resulted from the beating. 70 Ark. 385; 89 Ark. 326; Bangs & Hardaway's American Text Book of Genito-Urinary Diseases, 500-1-2-3; 73 Ark. 570; 44 Ark. 122.

3. The second instruction, if taken alone, is a correct declaration of the law. Cooley on Torts, 538; Wood on Master & Servant, § 307; 58 Ark. 381; 42 Ark. 542; 62 Ark. 109; 68 Ark. 249; 75 Ark. 585. If erroneous, it was cured by proof of ratification, the proof showing that appellant retained Gentry in his employment as a warden of the farm for months after the beating.

4. Gentry's act was criminal *per se*. It could not lawfully be inflicted upon the meanest prisoner for the most heinous offense. Rule 6, Penitentiary Rules for Arkansas; 44 Ark. 123; 8 Lea (Tenn.), 739; *Id.* 744; 6 Lea (Tenn.) 624; 9 Cyc. 877; 39 Fed. 599, 4 L. R. A. 628.

KIRBY, J. This suit was brought by Mrs. Mattie Reynolds, administratrix of the estate of William Reynolds, deceased, for damages for his wrongful death, caused, it was alleged, by defendant's warden, in charge of his convict farm where her intestate was detained a prisoner working out a sentence of fine and imprisonment for a misdemeanor under the lease of convicts from Lincoln County, unlawfully and brutally whipping and beating him.

The complaint contains two causes of action, sufficiently alleged in separate paragraphs, one for the benefit of the widow

and next of kin of decedent, and the other for the benefit of his estate, and in each of which damages are claimed in the sum of \$5,000.

A demurrer was filed and overruled, and defendant answered, admitting that he was operating a convict farm and leasing Lincoln County convicts, and that deceased was sent to his farm under said lease, and died there a week or two after arrival; denied that William Reynolds, deceased, was assaulted or whipped by W. L. Gentry, or any one else as alleged; denied all the other allegations of the complaint; "and he says further that, if the said Reynolds was assaulted or whipped by Gentry or any other person in any manner whatever, it was without the knowledge, consent or direction of this defendant, and beyond the scope of authority of employment of the said Gentry by this defendant. Further answering, defendant says that he has faithfully carried out every item of his contract with Lincoln County in the matter of leasing prisoners in relation to the said William Reynolds; that the death of the said Reynolds was due to natural causes; that it was in no way due to any mistreatment by this defendant or his employees; that everything was done for the said Reynolds that could be done under the circumstances; that neither this defendant nor his employees are in any way responsible for his death; that the defendant is seldom about the farm, and knew nothing personally of his sickness until after his death; that as soon as his condition was discovered everything that could possibly be done for the deceased was done by the defendant and his employees;" and denied that plaintiff was entitled to punitive damages.

The jury returned a verdict for the plaintiff for damages for the benefit of the widow and next of kin in the sum of \$3,750. Defendant appealed.

The evidence shows substantially that Mattie Reynolds was duly appointed administratrix; that she was the wife of William Reynolds, and they had three small children, two girls and a boy, of the ages of three, six and seven years; that William Reynolds was convicted of a misdemeanor in Lincoln County, and sentenced to a small fine and imprisonment, and sent to the convict farm of defendant, T. F. Tillar, under his lease of convicts from Lincoln County, about July 8, and remained there

in the custody and under the control of defendant's warden, G. L. Gentry; that on the morning of July 18, the warden compelled him to take off his clothes and lie down across a log or block, face downward, and whipped him on the bare back with a leather strap about 30 inches long and from one-half to three quarters of an inch thick. One witness says it was an inch thick. This strap was fastened to a staff, and "Mr. Gentry handled the strap with both hands, over his shoulders," and struck deceased from 12 to 15 licks hard, one witness say; and another, that "he whipped him on the small part of his back. Gentry was standing by his side. I was standing right there. He had me here to hold him down if he bucked. The licks were hard. He hit him with both hands." That, after the whipping, he was sent to work, and the guard in charge of his squad said that he commenced complaining of his kidneys hurting him about 11 o'clock. That afternoon he acted like a drunk man, wanted to urinate frequently. "He complained of the small of his back hurting, and his kidneys hurting him. He wasn't able to work. He was urinating all evening. Every five minutes he urinated blood. I sent for Mr. Gentry to come and get him; he came and got him. The man was dead when I got in." Reynolds died that night about 8:30 o'clock without any medical attention whatever. The witnesses who prepared the body for burial stated: "We noticed a couple of black spots over the small of his back and back down otherwise on him. They were black spots about the size of my hand. Over his loins and down he was bruised pretty badly, from half way of his back down; there was a great big blue place on him right across the small of his back. They looked like they were very severe." That the beating might have caused and probably did cause his death. It showed further that Reynolds's wife and children were solely dependent upon him for support; that he was engaged in getting out staves at the time of his conviction, and shortly before for a number of months he had been making from \$50 to \$60 a month as a car repairer, the greater part of which he contributed to the support and maintenance of his wife and children; that he was strong and of sound bodily health, and had an expectancy of life of 34 years.;

Rule 6 of the penitentiary board is as follows:

"No convict shall for any cause be punished by whipping on his naked body; and no warden shall whip any convict except he be designated and authorized to do so by the superintendent monthly to the board, together with the causes therefor, and a witness shall be called to all whippings, and in no case shall more than ten lashes be administered at any one time."

Several instructions given are complained of, but only error in giving the one numbered 2 is insisted on here. It is copied in the opinion.

The appellant raises three objections, contends that there was a misjoinder of actions; that the court erred in giving plaintiff's instruction number 2 hereafter set out; argues that the evidence does not sustain the verdict, and claims that the verdict is excessive. There is nothing in the first contention. The actions could be joined, and were properly brought together, and the demurrer should have been overruled. Kirby's Digest, § § 6290, 6089; *Davis v. Railway*, 53 Ark. 117. If the two actions had been brought separately, they could have been consolidated by the court. Acts, 1905, c. 339; *Mahoney v. Roberts*, 86 Ark. 138; *Ashford v. Richardson*, 88 Ark. 124; *American Ins. Co. v. Haynie*, 91 Ark. 51.

Did the court err in giving plaintiff's instruction number 2: "You are further instructed that the employer who puts his agent or employee in a place of trust or responsibility, or commits to him the management of his business, is responsible when the agent or employee acting within the scope of his authority, through lack of judgment or discretion, or under the influence of passion, inflicts an unjustifiable injury upon another, *even though he go beyond the strict line of his duty or authority*," the objectionable part of the instruction being the italicized words?

We think not. It is undisputed that Gentry, the warden, was defendant's agent in charge of the convict farm at the time Reynolds was delivered to the farm, and at the time of his death and for months thereafter, and that he was instructed to observe the rules laid down by the penitentiary board governing the convicts confined in the penitentiary, and charged by defendant not to depart from said rules in the management and punishment of the convicts placed on the farm. He had

the authority to punish, and was acting within the scope of it when he inflicted the injury.

In *Ward v. Young*, 42 Ark. 543-4, in discussing the liability of the master for the tort of his servant, this court said: If Hawkins was clothed with the authority to protect the property, "then his act was, in law, the act of Ward, notwithstanding it may have been contrary to express orders. Having employed the servant to protect his property, or to maintain his possession, he is liable for all the acts done in pursuance of his employment, and within the power implied therefrom, even though he expressly directed the servant what to do. Having set in motion the agency for producing mischief, he is bound at his peril to prevent the mischievous consequences."

Further: "It is not necessary, in order to fix the master's liability, that the servant should, at the time of the injury, have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and, if so, the master is liable, even though the servant acted *wilfully*, and in direct violation of his orders."

Continuing, on page 553: "It is generally sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment.

"The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the *care of his property*, is justly held responsible when the servant through lack of judgment or discretion, or from *infirmity of temper*, or under the influence of passion aroused by the circumstances or the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." Cooley on Torts, page 538.

In *Railway Company v. Hackett*, 58 Ark. 387, this court said: The question is, was he acting in the course of his employment? "If he was, the company is liable in damages for any wrongful act of his in the course of his employment, result-

ing in injury to another, though he exceeded his authority as such night watchman."

"A servant may do an act expressly forbidden by his employer, and yet, if it be within the scope of his authority, the employer may be liable for resulting injury. This rule is constantly enforced in the cases against railroads, electric light and gas companies, and it applies to private persons who employ servants to transact their business." *Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 116.

This court on a question of this kind quoted with approval Clark & Skyles' Law of Agency: "It is a well-established rule that a principal is liable for all torts, negligences, or rather, malfeasances, committed by his agent in the course of his employment and for the principal's benefit, although such torts or negligences are not authorized by the principal, or even though he had forbidden or disapproved of them, and the agent disobeyed or deviated from his instructions in committing them. * * * This rule is not based on the ground that the agent had authority, express or implied, to commit the tort, as is the case with contractual obligations binding on the principal; but is based on the ground that in such cases the agent represents the principal, and all acts done by the agent in the course of his employment are of the principal, and it is also on the ground of public policy that where one of two innocent persons must suffer from the agent's wrongful act, it is just and reasonable that the principal, who has put it in the agent's power to commit such wrong, should bear the loss, rather than the innocent third person." *St. Louis, I. M. & S. Ry. Co. v. Grant*, 75 Ark. 585.

There was no error in giving the instruction, and on the whole the instructions fairly presented the issues of fact to the jury. The evidence, although somewhat contradictory, tended strongly to show that the deceased was unlawfully and brutally whipped and beaten on his bare back with a leather strap four inches wide, and from one-half to three-quarters of an inch thick and about thirty inches long, attached to a staff or handle about 18 inches long, by defendant's agent and warden; that he wielded the strap with both hands, striking more licks than felons in the penitentiary are permitted to be whipped, and on the bare skin, even if against defendant's directions; that de-

ceased was compelled to work thereafter in the sun till he reeled and staggered like a drunken man, and was sent from the field groaning with pain and urinating blood, and died that night early, without being furnished any medical attention; that the beating might have produced, and probably did produce, death, and the jury so found, and the evidence amply sustains the verdict.

Is the verdict excessive? Was William Reynolds's life of the value of \$3,750 to his widow and minor children? He was a strong man, of sound bodily health, the sole support of his wife and children, about 31 years old, with an expectancy of life of 34 years, and shown to have been earning shortly before his death from \$50 to \$60 a month, most of which was contributed to the maintenance and support of his family, and the jury fixed the damages at that sum, which we do not regard excessive.

Finding no error in the case, it is affirmed.

JONES v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY
COMPANY.

Opinion delivered November 7, 1910.

1. RAILROADS—DUTY TO TRESPASSER ON TRACK.—To a trespasser upon its track a railroad company owes no duty save to exercise ordinary care to avoid injuring him after discovering his perilous position. (Page 369.)
2. TRIAL—REOPENING CASE.—It is a matter within the trial court's discretion to refuse to permit plaintiff to reopen a case and introduce additional testimony after the court had announced that a peremptory instruction would be given to find in favor of the defendant. (Page 370.)

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; affirmed.

W. H. Arnold, for appellant.

1. Where the answer admits a material allegation in a complaint, no proof is necessary on that point, and the allegation should go to the jury as evidence. 31 Cyc. 214; Kirby's Digest, § § 6137, 6138; 41 Ark. 17; 46 Ark. 132; 73 Ark. 344; 11 Am. & Eng. Enc. of Law, (2 ed.), 488; 134 U. S. 241; 59

Cal. 97; 40 Pac. 491; 20 Am. St. Rep. (Col.) 290; 38 Ill. 409; 66 N. Y. (Hun) 12; 90 N. Y. 110; 40 S. W. (Mo.) 1030 28 Pac. 201; 103 U. S. 262.

2. It was error to refuse to admit offered testimony to show that the engineer had stated that he saw deceased on the track some distance ahead of the train before it struck him. His statement when made was an instinctive exclamation called out and emanating from the accident. It was admissible as a part of the *res gestae*. 61 Ark. 52; 72 Ark. 581; 89 Ark. 261; 54 Ill. App. 27.

3. The answer of a witness that deceased was in "a suffering condition" was erroneously excluded. A nonexpert may testify that one who has just sustained an injury appeared to be suffering pain. 12 Am. & Eng. Enc. of Law (2 ed.), 422, and cases cited; 112 Ill. 16; 75 N. W. 1121; Greenleaf on Ev., § 102; 87 Ark. 278; 22 Ark. 93; 66 Md. 419; 95 U. S. 232.

4. It was a question that ought to have gone to the jury whether the operatives of the engine saw deceased on the track in time to have prevented the injury by the exercise of proper care. 74 Ark. 407; *Id.* 478; 80 Ark. 169; *Id.* 382; 89 Ark. 496; 46 Ark. 513; 84 Ark. 241; 87 Ark. 628; 88 Ark. 204; 90 Ark. 398; 69 Ark. 380; 33 Ark. 350; 39 Ark. 491.

5. Where there is evidence legally sufficient to show that there was an appreciable interval of conscious pain and suffering after the accident and before the death of the party injured, there is a question for the jury to decide which a peremptory instruction for the defendant invades and destroys. 59 Ark. 215; 84 Ark. 241; 55 S. W. (Ark.) 840; 79 Ark. 621; 13 Cyc. 384; 61 Fed. 592.

W. E. Hemingway, E. B. Kinsworthy, H. S. Powell and James H. Stevenson, for appellee.

1. The answer can not be construed into an admission that the employees of defendant failed, after discovering the peril of the deceased, to use reasonable care to avoid injuring him. Such failure is specifically denied. A plaintiff who alleges discovered peril has the burden of proving, not only that the trainmen discovered the injured party, but also that they did so in time to have prevented his injury by the use of ordinary care.

2 White, Pers. Inj., § 1083; 76 Ark. 10; 69 Ark. 380; 86 Ark. 306; 83 Ark. 300; 82 Ark. 522.

2. The testimony offered as to statements made after the accident occurred came too late. A motion to introduce further testimony after the case is closed and the instructions settled is addressed to the sound discretion of the trial court, and its action thereon is not reviewable on appeal unless there has been a manifest abuse of discretion. 36 Ark. 369; 32 Ark. 562; 61 Ark. 55; 6 Thompson on Neg., § 7741.

3. The record does not show that the answer of a witness that deceased was in "a suffering condition" was excluded, nor ruling made by the court thereon, nor exceptions saved to its exclusion, if it was excluded.

4. Any liability on the part of appellee must rest upon the theory of discovered peril, which is not shown. On the contrary, it is admitted that deceased was a trespasser, and the proof shows that he was guilty of contributory negligence in failing to look and listen for a train before going upon the track. 64 Ark. 364; Thompson on Neg., § § 1768, 1775; 2 White, Pers. Inj., § 1083; 69 Ark. 380; 86 Ark. 306; 83 Ark. 300; 82 Ark. 522.

5. The question of conscious suffering after the accident and before death does not enter into this case. The court properly took the view that no negligence on the part of the defendant was shown.

McCULLOCH, C. J. J. S. Jones was run over and killed by a northbound freight train of the St. Louis, Iron Mountain & Southern Railway Company near Mandeville, in Miller County, Arkansas, and the plaintiff, as administrator of said decedent's estate, instituted this action to recover damages on account thereof. Jones was walking along the middle of the track when an engine, approaching from behind, struck him; and it is alleged in the complaint that the company's employees in charge of the train "saw the deceased in a dangerous position, and, without any regard for his safety or his life, said defendant's employees failed to give any signal or any warning to plaintiff's intestate as to the approach of the train, as was their duty to do, so as to have enabled him to have cleared the track and secured himself from danger; but the employees

in charge of said engine and train, after seeing plaintiff's intestate, wilfully, maliciously and wantonly rushed the train upon him, without checking the speed of said train or using any appliances under their control to avoid the accident."

The evidence adduced by the plaintiff at the trial showed that Jones entered upon the track at a crossing a short distance north of Mandeville, and walked northward along the track. This was about 3 o'clock in the afternoon. The road is double-tracked along there—the east track being used for northbound trains and the west track for southbound trains. He was first on the west track, and was going north, and walked about 150 yards when he saw a southbound train approaching. He then stepped over to the east track, and proceeded on his journey up that track, and in a very short time he was overtaken and struck by the northbound freight train. According to the testimony of one of the witnesses, he walked about 200 yards up the east track, and did not look back before the engine struck him. The evidence tended to show that no signals were given from the northbound train, and that it was not slowed down before it struck Jones.

It is alleged in the complaint, and admitted in the answer, that Jones was "hard of hearing;" but no testimony was introduced on the subject tending to show to what extent his sense of hearing was impaired. The track along there was straight enough for the men on the engine to have seen Jones for a considerable distance ahead if they had been looking, but the only testimony on this subject adduced by plaintiff tended to show that they were not looking forward. The witness who testified on that subject stated that he was standing on one side of the track near the crossing, and that, as the engine passed, he saw the engineer looking to the side over into the woods, and did not see him turn to look forward.

The defendant introduced no testimony, and the court directed the jury to return a verdict in defendant's favor, which was done.

Did the plaintiff make a case sufficient to go to the jury?

Jones was a trespasser, and defendant's servants owed him no duty, except, after the discovery of his perilous position, to exercise ordinary care to avoid injuring him. The burden was on plaintiff to show that the servants in charge of the train

saw Jones in a position of peril in time to have avoided injuring him, and failed to exercise ordinary care to avoid the injury after discovering his peril. *Chicago, R. I. & P. Ry. Co. v. Bunch*, 82 Ark. 522.

A case was not made by showing merely that the men on the engine saw Jones at some time and failed to give signals and slow down the train or stop. It devolved on plaintiff to show that they discovered him in time to have avoided the injury in some way. There is no proof in the record that the men on the engine ever discovered Jones's presence on the track at all before the injury, but it is insisted by learned counsel that the defendant in its answer admitted that they saw him in a perilous position on the track. Conceding that the answer can be construed to contain such an admission, it certainly denies that defendant's servants saw him in time to avoid the injury, or failed to exercise care to avoid it. The denials in the answer are as broad as the allegations of the complaint, and put in issue the question whether or not defendant's servants saw deceased in time to avoid the injury. Even if it was admitted that the men on the engine saw deceased, that was not sufficient to warrant a recovery, as it devolved on plaintiff to show that they saw him in time to have avoided the injury.

We are of the opinion, therefore, that the court did not err in giving a peremptory instruction in favor of defendant, for the plaintiff failed to make out a case sufficient to go to the jury.

Another error of the court is assigned in refusing, after the plaintiff had rested his case and the court had announced its ruling that a peremptory instruction would be given, to permit the case to be reopened and to allow plaintiff to show by witnesses that some time while the train was standing at the place of the accident the engineer stated that he had seen deceased on the track some distance ahead of the train before he was struck. Without undertaking to decide whether the proposed testimony was competent or not, we deem it sufficient in disposing of that assignment to say that it was a matter within the sound discretion of the trial court whether the case should be then reopened so as to allow the introduction of further testimony. *Brockway v. State*, 36 Ark. 629; *St. Louis, I. M. & S. Ry. Co. v. Faisst*, 68 Ark. 587; *Brinkley Car Works*

& Mfg. Co. v. Cooper, 75 Ark. 325. No abuse of the court's discretion is manifest.

Judgment affirmed.

STEWART v. FLEMING.

Opinion delivered November 7, 1910.

1. FRAUD—WHEN GOOD DEFENSE.—An answer which alleges that defendant was induced to sign the contract sued upon by false representations of plaintiff's attorney to the effect that the written contract contained the same terms as a former one on the same subject sets up a good defense. (Page 373.)
2. ESTOPPEL—FAILURE TO READ INSTRUCTION.—Where a lessee was induced to sign a lease by fraudulent representations of the lessor's agent as to its contents, his omission to read it will not estop him from setting up such misrepresentation in an action upon the contract. (Page 374.)
3. ESTOPPEL BY CONDUCT—EFFECT OF MISTAKE.—One who was induced, by fraudulent misrepresentation, to sign a contract to pay all assessments upon property leased by him will not be estopped to deny his liability therefor by reason of having paid one installment thereof if such payment was made by mistake or oversight. (Page 376.)
4. PLEADING—INDEFINITENESS.—Indefiniteness in a pleading should be reached by a motion to make it more definite. (Page 376.)
5. FRAUD—WHEN DEFENSE AT LAW.—In a suit upon a contract an answer alleging that the contract was procured by fraud sets up a defense available at law, and there was no error in refusing to transfer the case to equity. (Page 376.)

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; reversed in part.

Powell & Taylor, for appellant.

The court erred in refusing to transfer the cause to equity, in striking out paragraphs five and six of the answer, and that part of paragraphs seven and eight relating to the payment of levee taxes for the year 1906. Kirby's Digest, § 6098.

Henry Moore and Henry Moore, Jr., for appellee.

The court properly refused to transfer to equity, and properly struck out paragraphs five and six, and that part of seven

and eight relating to payment of levee taxes. 31 Ark. 170; 30 Ark. 686; 26 Ark. 28; 19 Ark. 522; 11 Ark. 58; 27 Ark. 244; 84 Ark. 349, and cases cited.

McCULLOCH, C. J. Plaintiff, Fannie R. Fleming, owned certain farm lands in Lafayette County, and on October 25, 1904, she entered into a written contract with defendant, Alex Stewart, leasing said lands to him for a term of seven years, commencing on the 1st day of January, 1906, the substance of said written contract being as follows:

1. That said lessee, in consideration of said lease, obligates himself that he would, during the entire term of said lease, keep all taxes and legal assessments on or against said lands promptly paid as the same should come.

2. That he would, at his own expense, keep all the necessary fences, levees, buildings and other improvements upon said lands, and for the protection and convenience thereof and of the tenants who would occupy the same.

3. That, if said lessee deemed it necessary for the protection of said lands, he would, at his own expense, have a survey made and the boundaries thereof clearly marked and defined.

4. That, in addition to the above obligations on the part of said lessee, he would, during the continuance of said lease, pay to the lessor as an additional annual rent for said interest in said lands the sum of \$1,000 on or by November 1, of each and every year during the term of said lease, with interest thereon after the maturity of said payments at the rate of 8 per cent. until paid.

The writing was executed in duplicate, a copy thereof being retained by each party. Subsequent to the date of said contract, the General Assembly of 1905 passed an act creating the Long Prairie Levee District, which embraced a portion of the lands in question, and special assessments were levied upon the lands for the construction and maintenance of the levee.

Plaintiff instituted this action in the circuit court of Lafayette County against defendant in April, 1909, to recover the amount of the rent for the year 1908, \$1,000, which remained unpaid, and also to recover the sum of \$292.68 for

levee taxes for the year 1907, and \$474.62 for levee taxes for the year 1908, which defendant had refused to pay.

Defendant filed his answer, in which he denied that he had ever agreed to pay the levee taxes on the land; that at the time he entered into the lease contract with plaintiff he was then cultivating the land under a former written contract with her, expiring December 31, 1905, under which he was paying rent in the sum of \$800 per annum, and paying the taxes assessed against the land during the period of the lease, and at his own expense keeping the premises in repair, which contract, it is alleged, contained substantially the same conditions and stipulations as those agreed upon in the last contract; that the last contract was intended as a continuation of the former lease, except as to the additional two hundred dollars per annum to be paid as rent, but that the plaintiff's agent prepared and presented to defendant for execution the last contract and represented to him that it contained the same provisions and stipulations as the former contract, except as to the amount of rent; that the former contract did not contain the words, "any legal assessments on or against said lands;" that said agent of plaintiff is an experienced lawyer, whereas defendant is inexperienced in such matters, and that in signing the contract he relied upon the representations of such agent. He admitted that he had paid the levee assessments of 1906, but that the same was done by mistake, and he seeks to recover same back. The answer contained a prayer that the cause be transferred to the chancery court, etc.

The court, on motion of plaintiff, struck out the foregoing allegations and prayer, and to each ruling defendant excepted. This ruling of the court left defendant without any defense, but a trial was had before the court sitting as a jury upon the allegations of the complaint, and judgment was rendered in favor of plaintiff for the amount claimed. Defendant appeals. There is no controversy as to the amount of the rent for the year 1908, or that it has not been paid; so that part of the judgment, for \$1,000 rent and interest, will be affirmed.

The answer alleged, in substance, that the defendant was induced to sign the contract by false representations of plaintiff's attorney and agent to the effect that the written contract contained the same terms as the former one except as to the

amount of rent, which had been agreed upon, and that he relied upon said representations. This, we think, constituted a good defense to the suit for the recovery of the levee taxes, and the court erred in striking it from the answer. There was a very material difference between the two contracts with respect to the payment of taxes, in that the last contract—the one now sued on—in addition to the agreement on the part of defendant to keep all taxes on the land paid, added the words “and legal assessments.” The difference was a material one, for, under the language of the former contract specifying only “taxes,” it could not have been within the contemplation of the parties that special assessments for levee purposes were to be included when no levee district had been organized at the time of the execution of the contract. *Sanders v. Brown*, 65 Ark. 498. The alleged false representations were, then, material, and were made concerning the contents of the written contract. It is further alleged that defendant relied on same, and was induced thereby to sign the contract. It is true that the answer does not specifically state that the defendant did not read the contract, but that is clearly inferred from the language of the whole allegation; and, in the absence of a motion to make the allegation more specific, it should have been so treated by the court. These allegations, if proved, would constitute a good defense against the recovery of the levee taxes. *Gammill v. Johnson*, 47 Ark. 335; *Graham v. Thompson*, 55 Ark. 296; *Mason v. Thornton*, 74 Ark. 46; *Scott v. Moore*, 89 Ark. 321.

It is insisted by learned counsel for plaintiff that the allegations of the answer do not present a good defense, for the reason that the defendant had an opportunity to read the contract, and can not be heard to say that he did not know what it contained. They cite in support of that contention the decision of this court in *Colonial & U. S. Mortg. Co. v. Jeter*, 71 Ark. 185. In that case, however, there was no allegation or proof that the signing of the contract was induced by any false representation as to its contents. From Judge BATTLE's opinion in that case it clearly appears that no such representation was made, for the opinion states: “It (the testimony) did not show that any one misrepresented to him its contents,

but it does show that the contract was sent to him by mail, to be returned in like manner when he executed it; and that he had the opportunity to examine it at his leisure, and as thoroughly as he wished. He took it home with him, and kept it there three or four days. He then took it to his lawyer, and consulted him about it, and then signed it and the notes, and returned them by mail. He can read and write, and was without a reasonable excuse for failing to read and understand them."

In *Gammill v. Johnson*, *supra*, Chief Justice COCKRILL, speaking for the court, said: "It is true that when the means of information are open to both parties alike, so that with ordinary prudence and vigilance each may be informed of the facts and rely upon his own judgment in regard to the thing to be performed or the subject-matter of the contract, if either fails to avail himself of his opportunities, he will not be heard to say he has been deceived. * * * But when the representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him. It does not lie in the mouth of the declarant to say it was folly in the other party to believe him."

In *Graham v. Thompson*, *supra*, the court said: "The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them."

So, in the present case, if the allegations of the answer are true, it does not lie in the mouth of plaintiff to say that the defendant had no right to rely upon the representation that the contract contained the same terms as the former lease. Defendant alleges that he relied on the statement. If that is true, it caused him not to read the contract, and he is not estopped, under those circumstances, to plead his ignorance.

Our attention is called to the case of *Rommel v. Griffin*, 81 Ark. 269, in support of the contention that it was the duty of the defendant to read the contract within a reasonable time.

In that case, however, there had been no misrepresentation as to the contents of the insurance policy, though there had been as to the application upon which it was based. The policy was issued by the company and sent to the assured by mail, and he kept it without examination for an unreasonable length of time. This, the court held, was an acceptance of it. The court said: "It was his duty to examine the policy in a reasonable time after he received it, that is, in such a time as he could have done so, and if he rejected it to so inform the insurance company or its agent; and, failing to do so, he is deemed to have accepted it, and is liable upon his note. After such acceptance he can not avoid the payment of his note on the ground that he did not read the policy, unless he was induced by the insurance company, or its agent, not to do so."

The allegation in the defendant's answer that there was a false representation as to the contents of the writing clearly distinguishes this case from the one just referred to.

Nor is defendant estopped to take advantage of the alleged false representation by the fact of his having paid the levee taxes for one year if, as alleged in the answer, this was done by mistake and oversight. The allegations of the answer in this respect are not sufficiently definite and certain, but should have been met by a motion to make more definite.

There was no error in refusing to transfer the case to equity, for the defense set up in the answer could as well be made at law. But defendant was entitled to a hearing upon these allegations, and the court erred in striking them from the answer. For this error the judgment is reversed as to the claim for taxes, and the cause remanded for new trial.

QUEEN OF ARKANSAS INSURANCE COMPANY v. DILLARD.

Opinion delivered November 7, 1910.

INSURANCE—IRON-SAFE CLAUSE—CONSTRUCTION.—The iron-safe clause in a fire insurance policy requiring the insurer to keep an inventory of

stock and a set of books, has no application to a policy insuring the furniture and fixtures of a job printing office where the insured kept no stationery or other stock on hand.

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; affirmed.

J. W. & M. House and *J. W. House, Jr.*, for appellant.

As to "supplies," there has been no attempt to comply with the iron-safe clause of the contract. This word necessarily includes stationery, ink and things of like nature used in the business of the insured. 44 Am. St. Rep. 893; 68 N. Y. Supp. 781. Every word used in the contract should be given a reasonable meaning, to the end that the intention of the parties may be given effect. 3 Fed. 560; 18 L. R. A. 97; 12 N. Y. Sup. Ct. (5 Duer), 594; 3 Ark. 252. There being no substantial, nor any attempted, compliance with the clause, appellee can not recover. 53 Ark. 353; 58 Ark. 565; 61 Ark. 207; 62 Ark. 43; 65 Ark. 240; 85 Ark. 579; 83 Ark. 126; 91 Ark. 310; 61 S. W. 692; 36 S. E. 821; 63 Ark. 187; 52 Ark. 257.

Webber & Webber, for appellee.

Appellee kept no stock of stationery. As he needed material for a job, he obtained what he needed for that job from a dealer. He kept no books nor any iron safe, and the appellant's agent knew it. There was no need for a safe, nor to keep books, and it was manifestly the intention of the parties to insure the job office as a printing outfit, including such articles as formed a part of it. 52 Ark. 11; 2 Parsons (8 ed.), 617, 623; 19 Cyc. 655, and note 11; *Id.* 656, and note 13; *Id.* 657, and note 15; *Id.* 664, and note 52; *Id.* 660, and notes 32 and 34.

HART, J. J. H. C. Dillard brought this suit against the Queen of Arkansas Insurance Company and the sureties on its bond to recover upon a policy of fire insurance upon certain personal property.

The description of the property insured, as it appears in the policy, is as follows:

"Four hundred dollars on his office furniture, fixtures and supplies, including desks, tables, chairs, stands, type, type cases.

presses and electrical fixtures as are necessary to his use, and such other furniture and fixtures."

The policy was issued on September 2, 1908, and the property insured was destroyed by fire on November 15, 1908. The loss was total, and the property was of the value of \$1,000.

The property insured consisted of a printing press, a cutter and stitcher, brass rules, and the type necessary to operate the press, and the office furniture. The business conducted by the insured was job printing, and no stock of any kind was kept on hand either for use or for sale. It was the custom of the insured when he secured a job to go out and buy the paper and envelopes necessary to use in doing the work. The policy recited that the insurance was subject to the condition of the iron-safe clause, which was in the form usual in standard policies of fire insurance. The insured kept no books, and made no attempt to comply with the iron-safe clause.

From a judgment of \$400 rendered against them the defendants have appealed to this court.

The court instructed the jury that the iron-safe clause, which was a part of the policy, and which provided for the taking of an inventory of stock on hand, and that the insured should keep a set of books, did not apply to the class of property named in the policy.

The assignment of error predicated upon this instruction is not well taken. The requirements of the iron-safe clause have reference to such articles of merchandise as constitute the stock in trade of the insured, and has no application to property in a policy like that under consideration. 2 Cooley's Briefs on Insurance, p. 1814, and cases cited.

The undisputed evidence in the case shows that appellee did not keep any stationery, blanks or other stock on hand; that he purchased the material for each job as he secured it. The object in requiring a set of books to be kept showing a record of the business transacted, and of the changes taking place from day to day in the stock of goods of the insured, is that the insurer may have the means of ascertaining the amount and value of the goods destroyed. *Southern Insurance Company v. Parker*, 61 Ark. 207. In cases like this where no stock of goods or other wares are kept on hand, it is apparent

that the requirement of the iron-safe clause can serve no useful purpose, and the maxim that "the law does not compel one to do vain or useless things" applies.

The judgment will be affirmed.

BECKLEY v. MILLER.

Opinion delivered November 7, 1910.

1. **APPEAL AND ERROR—EXCEPTIONS—PROVINCE OF BILL OF EXCEPTIONS.**—Where the bill of exceptions does not show that there were any exceptions saved to the ruling of the court in giving or refusing instructions, such errors will not be considered on appeal though the motion for new trial states that the court erred in this respect. (Page 382.)
2. **FRAUD—CONCEALMENT—EVIDENCE.**—Where a building contractor made default upon his contract, and his sureties took charge of the building and undertook to complete it, evidence that one of the sureties, who was placed in charge of the work by his cosureties, did not inform a subcontractor that his principal had defaulted, but concealed that fact from him, justifies a finding that such surety fraudulently induced the subcontractor to perform his undertaking, and hence that the sureties were liable for the amount due under the contract. (Page 383.)
3. **PRINCIPAL AND SURETY—ESTOPPEL.**—Where the sureties of a building contractor, upon his default, assumed to carry out his contracts, they are estopped to deny the terms of his contract with a subcontractor, which may be proved by the correspondence between the contractor and subcontractor. (Page 383.)
4. **TRIAL—PROVINCE OF COURT AND JURY.**—While a trial court may set aside a verdict and grant a new trial where the finding of the jury is clearly against the weight of the evidence, it has no power to reduce the amount found by the jury and enter judgment therefor, as the trial court cannot substitute its judgment for that of the jury upon a disputed question of fact. (Page 383.)

Appeal from Clark Circuit Court; *Jacob M. Carter*, Judge; reversed.

STATEMENT BY THE COURT.

The plaintiff, M. H. E. Beckley, brought this suit against the defendants, A. J. Miller, W. N. Adams, W. E. Adams, E. M. Hall, R. E. Major and J. M. Adams, to recover the sum

of \$506.40, alleged to be due him by the defendants for labor done and materials furnished in the erection of a school building in Arkadelphia.

No service was had upon the defendant, A. J. Miller. The other defendants answered, denying all the material allegations of the complaint; and the cause thereafter proceeded against them. The facts, so far as material to a determination of the issues involved, are substantially as follows:

On the 29th day of April, 1907, A. J. Miller and the Arkadelphia Special School District No. 1, of Arkadelphia, Arkansas, entered into a written contract whereby the former agreed to erect a school building for the latter according to the terms and specifications set out in the contract. Miller was required to execute a bond conditioned for the faithful performance of said contract, and the defendants herein signed the same as his sureties. Miller made a contract with the plaintiff to furnish the material and perform the labor necessary in placing blackboards on the walls of said school building. According to plaintiff's testimony, Miller wrote him for prices on the blackboard work on October 7, 1907, and again on January 4, 1908. Plaintiff made him prices by letter dated January 6, 1908, and the terms were accepted by letter from Miller dated January 15, 1908. Plaintiff furnished the blackboard, consisting of 3,376 feet, at 15 cents per square foot, making a total of \$506.40, as per the contract. The material was shipped about February 1, 1908, and the work of placing the same on the walls of the building was completed about March 25, 1908. No objection is made to the character of the work or of the materials; but it is the contention of the defendants that it was the contract of Miller, and that they are not liable.

The plaintiff adduced evidence at the trial tending to show that Miller abandoned and forfeited his contract; and that his bondsmen took charge of the work and completed the building under its terms; that they were in charge at the time the labor was done and the materials furnished by him were placed in the building; that the value of the service performed, together with the materials used, was \$506.40.

Ned Burson, who did the work for plaintiff, testified: "Mr. E. M. Hall was present as superintendent of the work during

the time that I worked on the job. He stated to me, in conversation, that there was a possibility that Mr. Miller would not be able to finish the job under the contract, and, if he did not do so, the bondsmen would complete the contract. He further stated to me that he was one of the bondsmen on Mr. Miller's bond. After I completed the blackboards Mr. Hall and I made the measurements, and he approved the measurements of the blackboard spaces."

E. M. Hall, for the defendants, testified that in December, 1907, Miller got behind with his bondsmen several thousand dollars, and that about the 1st of February, 1908, he took charge of the building as superintendent of Miller, and continued as such until the completion of the building about five months later. But, on cross examination, he admitted that he took charge of the work and completed it with an understanding on the part of both Miller and the bondsmen.

Evidence was adduced on the part of the defendants tending to show that the value of the work done and materials furnished by plaintiff was only \$214.

The record shows the following:

"The court on its own motion gave to the jury the following instructions, being in the form of queries, No. 1 and No. 2, same being all the instructions given by the court in this cause, to wit:

"No. 1. Did the defendant Hall, in the representation of his own interest, or in his own interest and his codefendants together, commit any fraud on the plaintiff by which plaintiff was induced to furnish and install the blackboards in place in the school building?

"No. 2. What was the cash market value of the blackboards in place in the school building at the time they were installed?"

Additional instructions were presented to the court by the defendants, but it does not appear from the record that any exceptions were saved to the action of the court in refusing same. The record further shows the following:

In answer to query No. 1, the following verdict or finding was by the jury returned, to wit: "Yes." (Signed) C. T. Clark, Foreman.

In answer to query No. 2, the following verdict or finding was by the jury returned, towit: "Five hundred and six dollars and forty cents (\$506.40). [Signed] C. T. Clark, Foreman."

Whereupon the court, over the objection of the plaintiff, reduced the amount of the finding of the jury from \$506.40 to \$214, and entered judgment therefor in favor of the plaintiff against the defendants.

Both parties filed their motion for a new trial, and, upon the same being overruled, have duly prosecuted an appeal to this court.

Callaway & Huie, for appellant.

It was error to refuse plaintiff's request for judgment on the verdict for \$506.40, and in reducing same to \$214, over his objections. 76 Ark. 88; *Id.* 538; 63 Ark. 94; 77 Ark. 556.

McMillan & McMillan, for appellees.

1. The court should have instructed a verdict for appellees. The mere fact that they signed Miller's bond would not entitle appellant to recover from appellees for the blackboard that went into the building. 86 Ark. 219.

2. Miller was not a party to the suit, and defendants would not be bound by an agreement made by him and plaintiff for the blackboard. Plaintiff's letter to Miller, "Exhibit C," is a self-serving declaration, and not competent evidence. 92 Ark. 476. "Exhibit D," Miller's letter, is hearsay, not binding on defendants. 89 Ark. 481. Letters, "Exhibits E and F," should have been excluded. They are hearsay, and written by third parties to plaintiff. 69 Ark. 305; 89 Ark. 481.

3. The value of the blackboard as found by the verdict was excessive. The trial court had the right to set aside the verdict, but if it erred in entering judgment for an amount it thought the evidence justified, the case should be remanded for a new trial, rather than for judgment to be entered upon this verdict. *Taylor v. Grant Lumber Co.*, 94 Ark. 566; 41 S. W. 251; 47 Ark. 567; 57 Ark. 461, 466.

HART, J., (after stating the facts). 1. It is insisted by counsel for the defendants that the court erred in the instructions given and in refusing those asked by defendants; but, under our rules of practice, we can not consider these assign-

ments of error. The bill of exceptions does not show that there were any exceptions saved to the ruling of the court in giving or refusing instructions. It is stated in the motion for a new trial that the court erred in this respect; but this is not sufficient. On appeal, "the matters complained of, together with the objections and exceptions to the rulings of the court, must be brought into the record by bill of exceptions, and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error." *McKinley v. Broom*, 94 Ark. 147, and cases cited.

It will be remembered that the defendants were sureties on the bond of A. J. Miller, principal contractor for the erection of the school house at Arkadelphia. The testimony on the part of the plaintiff tends to show that Miller made default on his contract, and that the sureties on his bond took charge of the erection of the building and undertook to complete it according to the terms of his contract; that E. M. Hall, one of the sureties, was placed in direct charge of the work, and was so engaged while the plaintiff performed his contract; that he did not inform plaintiff that Miller had made default in his contract, but concealed that fact from him. E. M. Hall, on cross examination, admitted that he took charge of the work upon an agreement between Miller and his bondsmen. Under such circumstances, it can not be said that the finding of the jury in response to query or instruction No. 1 is without evidence to support it.

2. The contract between the plaintiff and Miller was made by correspondence between them. These letters were introduced in evidence, and their introduction is assigned as error. The defendants were sureties on the bond of Miller, and completed his contract by arrangement with him. This is admitted by one of their number, and is not denied by the others. They thus assumed to carry out his contracts. While in charge, they permitted plaintiff to perform his contract, and after its completion accepted it. They are estopped from denying the terms of the contract; and it was competent to prove its terms by the letters in question.

3. We are of the opinion, however, that the court erred in reducing the verdict. While, as was held in the case of *Taylor v. Grant Lumber Co.*, 94 Ark. 566, the trial court may set

aside the verdict and grant a new trial where the finding of the jury is clearly against the weight of the evidence, it has no power to reduce the amount found by the jury and enter judgment therefor. Such action on the part of the court invades the province of the jury, and takes away from the parties the full benefit of the judgment of the jury, as guarantied by the Constitution.

The trial court may tell the jury in a proper case that there is no question of fact for it to determine; and may also set aside a verdict for errors committed by the jury, and grant a new trial; but it can never substitute its judgment for that of the jury upon a disputed question of fact. It is obvious that, if the trial court could do this, the verdict of the jury would have no binding force, but would be persuasive merely, as is the case of the verdict of a jury in a chancery court.

The amount to be recovered by the plaintiff was a disputed question of fact, and it was the exclusive province of the jury to determine it. This rule is established by an unbroken line of decisions in this court. See Crawford's Digest, vol. 2, pages 905 and 906; *Ib.* vol. 3, pages 463 and 464.

The court should have entered judgment for the amount of the verdict, \$506.40; and for the error in reducing the amount of the verdict and entering judgment therefor, the judgment will be reversed, and the cause remanded with directions to enter judgment upon the verdict.

KIRBY, J., not participating.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. WASHUM.

Opinion delivered November 7, 1910.

1. CARRIERS—LIVE STOCK—SHRINKAGE IN WEIGHT.—Shippers of live stock are entitled to recover for shrinkage in weight only where such shrinkage is due to unreasonable and negligent delay in transportation, and cannot recover because the stock ate less at their destination by reason of having been fed at an intermediate station, as this does not prove that they lost weight on account of delay in transportation. (Page 386.)
2. SAME—LIVE STOCK—INTERSTATE SHIPMENT—EXPENSES.—Under 34 Stat. at L. 607, providing that in the case of interstate shipments of live stock the time of their confinement, upon the written request of the shipper, separate and apart from the printed bill of lading, may be extended to 36 consecutive hours, if a shipper made such a request

of the carrier, and the cattle could have reached their destination within that time, the carrier had no authority to unload and feed the cattle at a way station and require the shipper to pay the feed bill. (Page 386.)

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin*, Judge; reversed.

W. E. Hemingway, E. B. Kinsworthy, Campbell & Suits and *James H. Stevenson*, for appellant.

1. It is not claimed nor shown that there was an unreasonable delay in shipment; or that the damages claimed resulted from such delay. In the absence of an express contract as to time of transportation, the carrier is held only to transport within a reasonable time by the use of all convenient dispatch. 41 Ark. 476; 2 Hutchinson on Carriers, § § 651-2-3.

2. Under the Federal twenty-eight-hour law, it is the duty of the carrier to give to cattle the required and reasonably necessary food, water and rest. It does not impose upon the carrier, because a release is signed, any undertaking not to unload the cattle for food, etc., when necessary. 34 Stat. L. 607; Fed. Stat. Ann. (Supp.) 43; 79 Tex. 444; 80 Ga. 210; 168 Mass. 257; 145 Ala. 686; 123 Ala. 683; 107 N. W. 1045; 170 Mass. 44; 104 Wis. 646; 12 Tex. Civ. App. 645.

3. There is no evidence upon which the alleged damage can properly be computed. 34 Ark. 318; 73 Ark. 112; 41 Fed. 913.

4. The alleged shrinkage in weight was not a consequence which the appellant might reasonably have anticipated from the feeding and watering at Illmo, even if that had been wrongful. 74 Ark. 358; 21 Mo. App. 273.

5. The owner was liable for the reasonable expense for the feeding, etc., at Illmo. Act Congress, June 29, 1906, § 2; Fed. Stat. Ann. Supp. 44.

W. A. Cunningham, for appellee.

HART, J. This is an action instituted by appellee against appellant to recover damages for an alleged unreasonable delay in the shipment of three cars of cattle from Imboden, Arkansas, to the National Stock Yards at East St. Louis, Illinois. The cattle left Imboden at about 12 o'clock in the daytime, and arrived at Illmo, Missouri, at 6 or 7 o'clock the next morning. There the cattle were unloaded, watered and fed, caus-

ing a delay of about 10 hours. Other cattle that arrived at Illmo on the same train, and which were not unloaded, were sent forward within an hour. The run from Illmo to East St. Louis was from 12 to 16 hours. Before the cattle were shipped, appellee signed what is commonly known as the 36-hour release contract. There were 82 head of cattle in the three cars. Appellee testified that, by reason of the cattle being fed and watered at Illmo, the cattle would not take the "fill" when they arrived at the stock yards. That, as a consequence, when he marketed the cattle, there was a shrinkage in the weight of the 82 head of 25 pounds each, and his loss therefrom amounted to \$73.80; that the feed bill at Illmo amounted to \$9.

From a judgment rendered in favor of appellee for the sum of \$82.50 this appeal is prosecuted.

Appellee makes no claim for damage on account of a fall in the market price of cattle. The only element of damage claimed by him is that alleged to be on account of their loss of weight. The evidence does not show that the loss in weight was on account of the delay in the transportation of the cattle. Appellee does claim, however, that because the cattle were fed and watered at Illmo they would not take the proper amount of "fill" when they arrived at the stock yards, and that in consequence of this there was a shrinkage in their weight. This is not a proper element of damages. The shrinkage in weight must be due to the unreasonable and negligent delay of the carrier in the transportation of the animals. The fact that, because they were fed and watered at Illmo, they would eat and drink less when they arrived at their destination does not establish that they lost in weight on account of delay in transportation.

We are of the opinion, however, that appellee should recover the amount of his feed bill. Counsel for appellant contends that it was the duty of appellant, under the Federal statute, commonly known as the 28-hour act, to have stopped at Illmo and unloaded the cattle in properly-equipped pens for rest, water and feeding for at least five consecutive hours. 34 Stat. L. 607; Fed. Stat. Ann. (Supp.) 43. While section 1 of that act does prohibit railroads engaged in transporting cattle

from one State to another from confining the same in cars for a period longer than 28 consecutive hours, it also provides that upon the written request of the shipper, separate and apart from the printed bill of lading, the time of confinement may be extended to 36 hours. In the present case the undisputed evidence shows that the shipper made such request in compliance with the Federal statute, and that the cattle could and would have reached their destination several hours before the expiration of such time limit, had they not been unloaded at Illmo for the purpose of rest, feeding and water. Hence it will be seen that the cattle were fed at Illmo contrary to appellee's instructions, and he should not have been required to pay the feed bill. The feed bill was wrongfully exacted from him, and he is entitled to recover same.

Judgment will be entered here for the amount, which is \$9.

For the reason that there is no evidence to warrant a verdict for damage on account of loss of weight in the cattle, the judgment in that respect will be reversed, and the cause dismissed.

KIRBY, J., dissents.

WESTERN COAL & MINING COMPANY v. CORKILLE.

Opinion delivered November 7, 1910.

1. MASTER AND SERVANT—ASSUMPTION OF RISK.—An instruction to the effect that if a miner knew that there was a dangerous quantity of gas in an entry where he was told to work he did not assume the risk therefrom unless he appreciated the danger of working there was erroneous in a case where the miner, being experienced, must have appreciated the danger of working if he knew that there was a dangerous quantity of gas. (Page 390.)
2. EVIDENCE—HEARSAY.—Where it was a question whether defendant's vice principal ordered a certain brattice to be removed from an air course in a mine, such fact cannot be proved by proving that one of defendant's employees had said that the vice principal had given such a direction. (Page 392.)
3. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS.—Prior to the fellow servant's act (*Acts* 1907, p. 162), corporate employers were not

liable to their servants for injuries caused by the unauthorized and negligent act of a fellow servant. (Page 393.)

4. LIMITATION OF ACTIONS—AMENDED COMPLAINT.—Where the original complaint was not barred by the statute of limitations, the statute will not be a defense against an amended complaint which did not set forth a new cause of action, but merely amplified the original complaint. (Page 393.)

Appeal from Crawford Circuit Court; *Jeptha H. Evans*, Judge; reversed.

Ira D. Oglesby, for appellant.

Mechem & Mechem, for appellee.

FRAUENTHAL, J. The appellee's intestate, Peter Corkille, was employed by appellant as a tracklayer in a coal mine owned and operated by it at Denning. On May 6, 1905, he was severely burned and fatally injured by the explosion of inflammable gas while at work down in said mine, and died from the effects of said injuries on May 11, 1905. His administratrix instituted separate actions to recover on behalf of the next of kin and of the estate of the deceased, which were subsequently consolidated. The original complaints in both actions were filed on May 4, 1907. In the original complaints it was alleged that "the defendant was negligent in that it negligently suffered and permitted gases, fire-damps and other combustible and inflammable matter in dangerous quantities to accumulate in said mine, and that it failed to warn the deceased of the presence of such gases, fire-damp and other inflammable material in said mine." On August 6, 1908, amended complaints were filed, in which it was alleged, in effect, that the act of negligence in permitting and suffering said gas, fire-damp and other inflammable material to accumulate in said mine consisted in negligently breaking down and leaving open a brattice which destroyed the safe ventilation of the mine, and caused the accumulation of the inflammable gases.

The defendant denied each allegation of negligence charged against it, and pleaded as a defense the contributory negligence of the deceased and the assumption of the risk by him of the injury which he sustained.

On the day of the injury the deceased and a fellow-servant named Buchanan, at the direction of the foreman of the

mine, went down in the mine to take up some track in the north fifth entry. At the bottom of the slope they met the pit boss and the fire boss, and inquiry was made of the fire boss as to whether or not there was any gas in this entry. There is a conflict in the testimony as to the reply made by the fire boss to this inquiry. According to the testimony on the part of the plaintiff, he stated that the entry was clear of gas except a mile in the back end, but that there was no gas to hurt. On the part of defendant, the testimony tended to prove that he stated that there was gas in the back heading where a portion of the track had to be pulled. The pit boss stated to the men that if there was any gas they should be provided with a safety lamp. The testimony on the part of defendant tended further to prove that Buchanan was not familiar with the use of a safety lamp, but that Corkille was familiar with its use and in the detection of gas. The safety lamp was then given Corkille, and as he and Buchanan went on to the entry Buchanan said to Corkille that if there was enough gas to require a safety lamp they ought to have the fire boss to look after it, and that Corkille replied that he could look after it as well as the fire boss. The two men arrived at the entry at about 8 o'clock A. M., and the deceased proceeded to inspect the place for gas. He reported to Buchanan that there was no gas, and after working for a short time in the front portion of the entry with open lamps the deceased left for some tools and did not return until after probably two hours or more. The testimony on the part of plaintiff tended to prove that in the meanwhile, and about 9:30 A. M., a brattice located on an air course and about 1,500 feet from the slope where deceased and Buchanan were working, was broken down by fellow-servants, and was left open for a few hours, and that the effect of this was to destroy the ventilation in the entry where deceased was at work and to cause the accumulation in dangerous quantities of inflammable gases at that place. Shortly after the deceased returned to the north fifth entry and proceeded to work with the open lamp, the explosion occurred and caused the injury. The testimony on the part of the defendant tended to prove that the brattice was not broken in any manner.

The court gave a number of instructions on behalf of the plaintiff, among which was the following:

"6. If there was a dangerous quantity of gas in the entry where Corkille was, and he knew it and appreciated the danger of working there, then Corkille assumed the risk of danger from that cause, and plaintiff can not recover. But if there was a dangerous quantity of gas in the entry, and Corkille knew it, yet, if he did not appreciate the danger of working there, he did not assume the risk himself, and plaintiff is not barred from recovery on the ground of assumed risk."

The defendant saved its objection in the proper manner to the giving of the above instructions, and specifically to the latter portion thereof.

The defendant requested the court to give the following instruction, No. 8:

"You are instructed if you believe from the evidence the explosion was caused by the negligence of the employees of defendant in taking down and leaving down a part of a brattice, then for such negligence defendant is not liable, as these employees were fellow-servants of the deceased."

The court refused to give this instruction as asked, but modified the same by adding the following words:

"Unless the same was done with the knowledge and direction and authorization of Thomas. In such case the act of breaking through the brattice, if done, would be the act of defendant, and, if negligent, the negligence would be the negligence of defendant, and not of fellow-servants, and plaintiff would not thereby be barred of recovering under the law of fellow-servants."

1. It is contended by counsel for defendant that the court erred in giving that portion of instruction number 6, at the request of plaintiff, which stated:

"But if there was a dangerous quantity of gas in the entry, and Corkille knew it, yet, if he did not appreciate the danger of working there, he did not assume the risk himself, and plaintiff is not barred from recovery on the ground of assumed risk."

We think that this instruction was misleading and erroneous. The rule is well settled that while a servant does not assume the unusual risks of the service and of which he is ignorant, he does by his contract of employment assume all the ordinary and usual risks of the service and the dangers incident thereto,

and he assumes further all the risks which he knows to exist. If the danger arises from the negligent act of the master, and he becomes aware of such negligence, and has sufficient intelligence to know the effects of such negligence, then he assumes the danger arising therefrom. In cases where it may be doubtful as to whether or not the result of a negligent act of the master may prove dangerous, or where the servant does not have sufficient intelligence or experience to know that the result of such negligent act is dangerous, then it is proper to say that the servant must be aware of the negligent act and also appreciate the danger arising therefrom. But where the servant is aware of the negligent act, and also knows that such act is dangerous, it results necessarily that the servant appreciates the danger arising therefrom. *Labatt on Master and Servant*, § 259; 26 Cyc. 1179; *Southwestern Tel. Co. v. Woughter*, 56 Ark. 206; *St. Louis, I. M. & S. Ry. Co. v. Tuohey*, 67 Ark. 209; *Archer-Foster Construction Co. v. Vaughn*, 79 Ark. 20; *Graham v. Thrall*, 95 Ark. 560.

An instruction similar to the one above was reviewed by this court at this term in the case of *Western Coal & Mining Co. v. Moore*, and it was condemned as misleading and erroneous. In distinguishing the case in which it would and those in which it would not be proper to say that the servant must not only be aware of the negligence of the master, but must also appreciate the dangers arising therefrom, Mr. Justice HART, in delivering the opinion of the court in that case, said: "Where a servant is ordered by his master to do an act, he can not be said to have assumed the risk of the unusual peril to which he is subjected unless he knows and appreciates the danger, or unless such danger is obvious, for the reason that in such cases the servant has a right to assume that he is not sent into any unusual peril. But where the servant is not working under the direct supervision of the master, and where the defects connected with the service are open and obvious alike to the master and servant, and the servant of his own volition continues in the service, he assumes the risk. In such case it can not be said that the servant knows of the danger but yet does not appreciate it."

In the case at bar the evidence on the part of defendant tended to show that Corkille was experienced in the detection

of gas in mines and in his appreciation of the dangers arising from excessive quantities thereof. If then he knew there was a dangerous quantity of gas in the entry, he necessarily appreciated the danger arising therefrom and the danger of working with an open lamp at such place. The instruction was therefore misleading, erroneous and prejudicial.

2. In the trial of the case the testimony on the part of the plaintiff tended to prove that certain fellow-servants of deceased broke a brattice in an aircourse which caused a defective ventilation of the entry where deceased was at work and the resultant explosion, which caused the injury. The plaintiff introduced testimony by which she endeavored to prove that the pit boss, Thomas, who was the defendant's vice principal, directed and authorized these fellow-servants to break down the brattice. She attempted to prove this by the witness Roberts. This witness testified that he was one of this crew of fellow-servants who were looking for a leak in a piping, and that the brattice obstructed their progress. While near the brattice, the pit boss, Thomas, came by, and one of the gang went to him and asked him for authority to break down the brattice. He testified that in the dim light of the entry he saw the pit boss and the man, and recognized the voice of the pit boss, but that he did not hear what the pit boss said. The man returned to the rest of the gang and reported that the pit boss had said that they should tear down the brattice. It is not shown that the pit boss heard or could have heard this report made by this man, and he testified that he did not give such direction and had no conversation with any one at said place. This testimony, we think, was hearsay, and it was not a part of the *res gestae*. It was not a declaration which was the immediate accompaniment of any act done at the time of the explosion which caused the injury, nor was it therefore in the nature of a verbal act explaining or illustrating the accident itself. It was simply and solely introduced for the purpose of showing that authority was given to do an act which was afterwards carried out. Such proof could only be made by the person who heard such authority given, and the statement that the agent said that such authority was given would be purely hearsay and inadmissible, if made in the absence and without

the hearing of the person from whom he claimed to have received such authority. *Fort Smith Oil Company v. Slover*, 58 Ark. 168.

The injury upon which this action is founded occurred prior to the passage of the act of the Legislature of March 8, 1907 (Acts, 1907, page 162), known as the "fellow-servant law"; and the defendant was therefore not liable for the injury which resulted from the unauthorized and negligent act of a fellow-servant. *Graham v. Thrall*, 95 Ark. 560.

3. In its answer the defendant pleaded the statute of limitation. This plea was based upon the ground that the amended complaint set forth a new cause of action, and that it was filed after the lapse of the statutory bar. But we do not think the amendment to the complaint set forth a new cause of action. It was only a statement of the original cause of action in a more complete manner, and merely amplified the original complaint. The original complaint stated that the cause of action was based upon the negligence of the defendant in causing the explosion, and that the act of negligence was in causing a dangerous accumulation of gas at the place where deceased was working. The pleading was open to the objection that it did not state specifically or with certainty how or why the gas accumulated. The negligent accumulation of the dangerous gases was the basis of the cause of action, and the breaking of the brattice was only a specific statement of how the gases accumulated, and thus a more specific statement of the averments of the original complaint of the negligence of the defendant. The amendment was therefore only a continuation of the original complaint, and it took effect as of the date when the latter was filed. 1 Enc. Plead. & Prac. 621; *Wright v. Walker*, 30 Ark. 44; *Brockaway v. Thomas*, 32 Ark. 311; *Kuhns v. Wisconsin, etc., Ry. Co.*, 76 Ia. 67; *Gordon v. Chicago, R. I. & P. Ry. Co.*, 129 Ia. 747.

For the errors above indicated the judgment is reversed, and the cause remanded for a new trial.

KIRBY, J., not participating.

CURTIS v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered November 7, 1910.

1. TRIAL—DIRECTING VERDICT—REVIEW.—In determining whether the trial court erred in directing the jury to return a verdict in favor of the defendant, the rule upon appeal is to consider the testimony in its aspect most favorable to the plaintiff. (Page 395.)
2. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.—Though a railway company was negligent in failing to keep a lookout at a crossing, one injured there cannot recover if his negligence contributed proximately to the happening of the accident which caused the injury. (Page 396.)
3. SAME—DUTY OF TRAVELER AT CROSSING.—While a traveler upon a public street has a right to the use thereof, yet in approaching a railroad crossing, and in going upon or over it, he must use ordinary care for his own safety. (Page 396.)
4. SAME—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.—Where plaintiff undertook to pass between or over a train of cars, and was injured by the movement of the train, he was negligent if at the time he knew either that the engine was attached to the train or was about to be attached, preparatory to moving the train. (Page 398.)

Appeal from Hempstead Circuit Court; *Jacob M. Carter*, Judge; affirmed.

Hamby & Haynie, for appellant.

Giving the evidence of the plaintiff the consideration most favorable to him, there was a question of fact as to whether he was guilty of such negligence as to preclude a recovery, which should have gone to the jury. 89 Ark. 222; 76 Ark. 138; 57 S. E. 764; 39 S. E. 569.

Glass, Estes, King & Burford, for appellee.

Plaintiff's attempt to cross the track between the cars to which an engine was attached, or, if not attached, was likely to be at any moment, was contributory negligence as a matter of law, and precluded a recovery. 2 White on Pers. Inj. § 1028; 105 S. W. 385; 104 S. W. 258; 64 Minn. 415; 67 N. W. 223; 101 Mo. 113; 105 Mo. 399; 27 S. W. 717; 69 Ark. 138; 99 S. W. 66; 79 Ark. 625.

FRAUENTHAL, J. This was an action instituted by R. F. Curtis, the plaintiff below, to recover damages for a personal injury which he alleged he sustained by reason of the negligent act of the defendant. The injury was received by plaintiff while

he was attempting to pass between freight cars that were attached together in a train which was standing upon a public crossing in the city of Hope. The lower court directed the jury to return a verdict in favor of the defendant, which was done; and from the judgment rendered by the court in pursuance of that ruling the plaintiff has appealed. In determining whether or not the court committed error in directing the jury to return a verdict in favor of the defendant, the rule upon the appeal of the case is to consider the testimony in its most favorable aspect to the plaintiff. *Graham v. Thrall*, 95 Ark. 560. Viewing the testimony in this manner, the case is this: The plaintiff, who lives near Hope, came to that city on the day of the injury for the purpose of selling some country produce. The railroad track of the defendant runs in a northerly direction from Second Street to First Street, in said city, and crosses First Street at right angles; and beyond First Street it crosses the railroad tracks of the St. Louis, Iron Mountain & Southern Railway Company, which run parallel with First Street. It is about 400 feet from Second to First Street. On this occasion the plaintiff at about 2 o'clock P. M. crossed the defendant's track several times between these two streets in going from a store upon the east side thereof to a residence on the west side in making sale of his produce. The last time he crossed the railroad track in going to the residence he saw a freight train moving thereon in a northerly direction and towards First Street. After quitting the residence for the purpose of returning to the east side of the railroad track he proceeded to a point about 125 feet west of said track, and saw that the freight train had moved across First Street with the engine attached thereto and was completely blockading the street. He then walked to a point near the train, and looked towards the north end of the train, to which end he had just seen the engine attached, and saw no engine then attached to that end. He remained at this place for about ten minutes, waiting for the train to clear the crossing, and then proceeded towards the south end of the train for a distance of about two car lengths, and saw no engine at the south end of the train. He then returned to the crossing where the freight train was standing upon the street. He testified that at that time he had no idea of attempting to cross over between the cars; but, seeing no

engine at the north end of the train, he then attempted to cross between the cars. He caught hold of the ladder upon the inside of the car and placed his foot between the drawheads and thus drew himself up until he was standing on the bumpers between the cars, and at that moment the train moved back towards the south, and his foot was caught between the bumpers or drawheads of the cars, and was crushed to such an extent that amputation of it was necessary. The plaintiff testified that he knew that the freight train was then being made up upon this track by the defendant preparatory to leaving, and that switching thereof was being done for that purpose at that time; and that the freight train was standing not only across the street, but also across the tracks of the St. Louis, Iron Mountain & Southern Railway Company, just beyond the street when he attempted to cross between the attached cars. He testified, however, that, although he had seen an engine attached to the north end of the train a few minutes before making the attempt to cross, he did not see the engine at the moment he attempted to cross, and that at the time the train moved back he heard no bell or whistle. It further appears that it was a violation of the provisions of the ordinances of the city of Hope to obstruct any street at a railroad crossing for a longer period than five minutes at any one time.

It is contended by counsel for appellee that, under the view of the testimony adduced upon the trial of this case most favorable to plaintiff, he was guilty of contributory negligence, and therefore was not entitled to a recovery herein.

It has been repeatedly held by this court that, though the defendant may be guilty of negligence and of a violation of law, still the plaintiff can not recover if his own negligence contributed proximately to the happening of the accident which caused the injury. *Johnson v. Stewart*, 62 Ark. 164; *St. Louis, I. M. & S. Ry. Co. v. Leathers*, 62 Ark. 235; *St. Louis, I. M. & S. Ry. Co. v. Jordan*, 65 Ark. 47; *St. Louis S. W. Ry. Co. v. Cochran*, 77 Ark. 398; *Chicago, R. I. & P. Ry. Co. v. Smith*, 94 Ark. 524.

Thus it has been held that, although a railroad company was guilty of failing to comply with the statutory provisions requiring a lookout to be kept or requiring a bell to be rung

or a whistle to be sounded upon approaching a public crossing, yet a party injured by reason of such negligence would not be entitled to recover if he himself was guilty of any negligence which contributed to the happening of the accident which caused the injury. A traveller upon the public street or highway has a right to the use thereof at a railroad crossing, but in approaching such crossing, and in going upon or over it, he must use ordinary and reasonable care for his own safety. As is said in the case of *St. Louis & S. F. Rd. Co. v. Carr*, 94 Ark. 246: "To him the track itself is a warning of danger, and he is under the duty to exercise precaution to inform himself of the proximity of the train and to exercise ordinary prudence in avoiding injury." The presence of cars and an engine, either attached to them or in the immediate vicinity for the purpose of moving them, is an obvious warning of danger to an adult person attempting to cross over, under or between them. According to the great weight of American authority, it is gross negligence in a traveller to attempt to pass over or under or between the cars of a train which is standing on a railroad crossing to which an engine is attached, or to which he knows, or reasonably ought to know, an engine will be immediately attached, and which he knows or reasonably ought to know is ready to move.

In 2 Thompson on Negligence, § 1674, it is said: "The view of the writer, for whatever it may be worth, is this: If the train is lawfully obstructing the crossing, that is to say, if it has not obstructed it for a greater length of time than that prescribed by statute or ordinance or, in the absence of statute or ordinance, for an unreasonable length of time, then a pedestrian who attempts to continue his journey upon the highway by climbing over or between the cars does so at his own risk. The railway company is under no obligation to keep a special lookout for him or to take special pains to provide for his safety. * * * But, after the train has obstructed the crossing beyond the length of time prescribed by statute or ordinance or beyond a reasonable time in the absence of statute or ordinance, then the railway company is guilty of an unlawful obstruction of the highway; * * * and if pedestrians undertake that right by climbing over the obstructing train, the railroad company must see

to it that it does not kill them or injure them by an affirmative act of its own, by starting forward its train without giving them any warning of its purpose so to do, or without looking out for their safety in any way. American courts have, however, held, and with great unanimity, that in such cases the injury is to be ascribed as matter of law to the contributory negligence of the traveler, and that there can be no recovery of damages against the company." In the case of *Lake Shore & M. S. Ry. Co. v. Pinchin*, 112 Ind. 592, it is said: "A person who has knowledge that a train of cars is stopping temporarily at a way station on its way to its destination has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. * * * It will not avail the plaintiff to say that he was not fully aware of his danger, for the plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man. * * * One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence." 3 Elliott on Railroads, § 1169; 2 Shearman & Redfield on Negligence, § 479; *Hudson v. Wabash Western Ry. Co.*, 101 Mo. 13; *Corcoran v. St. Louis, I. M. & S. Ry. Co.*, 105 Mo. 399; *Jones v. Illinois Central Rd. Co.*, 104 S. W. 258; *Southern Ry. Co. v. Clark*, 105 S. W. 384; *Magoon v. Boston & M. R. Co.*, 31 Atl. 156; *Andrews v. Central Rd. & Banking Co.*, 86 Ga. 192, 10 L. R. A. 58.

In the case of *Andrews v. Central Rd. & Banking Co.*, *supra*, it is said: "Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, can not recover unless the engineer, conductor or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposure to danger."

In the case at bar the testimony of the plaintiff shows that he knew that the freight train which obstructed the street was making movements in making up the train preparatory to its leaving. He knew that the train was standing only temporarily over the street, and was liable to move at any moment. When

he left the residence, and was coming towards the track, he saw the train had moved upon the street, and saw the engine attached to the train and pulling it. When he arrived at the track, he said he did not then see the engine attached to the end of the train, but he knew that it was in the vicinity of that end of the train and was liable to move the train at any moment, for he testified that he had no idea then of attempting to cross between the cars. He waited only a few minutes, and then became impatient to cross. Within almost a moment after he got between the cars the train moved. The engine must necessarily have been at the end or within the immediate vicinity of the end of the train when plaintiff went between the cars. This the plaintiff knew, or with the exercise of ordinary care he must have known. He simply took the risk of being able to pass between the cars with safety; but in making the attempt to cross he must, under his own testimony and the physical facts of the case, have known that he was taking such risk. The case here presented is where an engine is attached to a standing train or virtually attached thereto, and the train is ready to move, and the plaintiff attempts to cross between the cars. It is not a case where cars are standing over the crossing with no engine attached or with no engine in the immediate vicinity and ready to be attached to the cars. Here the engine was either attached to the train when plaintiff went between the cars to cross over, or was in the act of being attached to the train when he went between the cars, because the train moved within a moment after he did pass between the cars. From the testimony most favorable to plaintiff, he cast himself upon a known danger and took a risk, known or apparent, that would probably result in his injury. Under such circumstances, as a matter of law, he was guilty of an act of negligence which proximately contributed to his injury.

The court did not err, therefore, in directing a verdict for the defendant, and the judgment must be affirmed.

OSBORNE v. STATE.

Opinion delivered October 24, 1910.

1. ERROR CORAM NOBIS—DOES NOT LIE WHEN.—A writ of error coram nobis does not lie in a criminal case to present evidence newly discovered after the lapse of the term at which the judgment of conviction was rendered. (Page 402.)
2. NEW TRIAL—NEW EVIDENCE—DISCRETION OF COURT.—Motions for a new trial upon the ground of newly discovered evidence are addressed to the sound discretion of the trial court, and the exercise of this discretion will not be disturbed on appeal unless it is apparent that it has been abused. (Page 403.)
3. SAME—WHEN NEWLY DISCOVERED EVIDENCE INSUFFICIENT.—Newly discovered evidence which is only cumulative or contradictory is insufficient ground for a new trial. (Page 403.)
4. WITNESS—MISCONDUCT OF JURY—COMPETENCY OF JUROR.—Under Kirby's Digest, § 2423, a juror cannot be examined to establish a ground for new trial except to show that the verdict was made by lot. (Page 404.)
5. LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY.—An indictment for larceny which describes the stolen property as "twenty-two saw logs" is sufficient. (Page 405.)

Appeal from Arkansas Circuit Court; *Eugene Lankford*, Judge; affirmed.

J. M. Brice, for appellant.

1. The writ coram nobis should have been allowed. Its purpose was to produce testimony, either before this court or the court below, discovered after the trial and judgment, which completely exonerated defendant from any crime. The motion therefor has merit and shows due diligence.

2. The testimony of Bradley, as explained, and of Osborne shows that the logs were not branded, and there was no testimony connecting defendant with the taking of the logs. 69 Ark. 545.

3. The indictment was fatally defective, and there was a variance between it and the proof.

4. The instructions, especially No. 1, were erroneous and invaded the province of the jury. The third asked by defendant should have been given—there being no evidence of a conspiracy with Parrish. 70 Ark. 204; 92 *Id.* 216; 32 *Id.* 239; 65 S. W. 376; 47 Ia. 684.

5. The judgment should be reversed for misconduct of the jury.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

1. The writ of error coram nobis does not lie, after the time for obtaining a new trial, on the ground of newly-discovered evidence. 58 Ark. 229; 79 *Id.* 302.

2. A verdict can not be impeached by the testimony of one of the jurors. Kirby's Digest, § 2423.

3. Without Bradley's testimony there was still evidence enough to convict. 69 Ark. 545 is not in point. Motions for new trial for newly-discovered evidence are addressed to the sound discretion of the court, and this court only interferes where there is apparent abuse of discretion. 85 Ark. 184; 41 *Id.* 229; 54 *Id.* 364.

4. The indictment sufficiently describes the property. The demurrer was abandoned or waived. 73 Ark. 455; 77 *Id.* 418; 70 *Id.* 337; 72 *Id.* 250.

FRAUENTHAL, J. The defendant, Al Osborne, was convicted of the crime of grand larceny, and sentenced to the penitentiary for a term of one year. He was charged with the larceny of "twenty-two sawlogs, of the value of thirty-three dollars, and the personal property of W. R. Nowlin." The testimony on the part of the State tended to prove that prior to and in March, 1909, Nowlin was the owner of a lot of sawlogs which had been placed in what is known as Garland Lake, in Arkansas County, and in the bayou connecting same with the Arkansas River. Some of these logs were marked with the brand of "K-4," and other marks of identification were thereon. They had been dug out of the sand, and the marks of the spade were on them; and they had been rafted with spikes, and spike holes were in them, and the bark had been knocked off the greater number of them. Later in March Nowlin found twenty-two of these logs in the possession of Sam Bradley, in the Arkansas River. Bradley was a representative of a lumber company engaged in rafting logs down the Arkansas and Mississippi rivers, and he testified that he had purchased these logs from the defendant. Nowlin and another witness testified that they saw these logs in the possession of the defendant and a person by the name of

Parrish about one week prior to finding them in the possession of Bradley, and that defendant and Parrish had the logs at that time in a crib in the bayou, and he did not think that they would raft the logs away, and on that account did not demand them. While his means of identifying the logs in the bayou were, we think, meager, yet his testimony and that of the witness then with him was sufficient to warrant the jury in finding that the logs thus seen by them in the possession of defendant and Parrish were the logs owned by Nowlin, and which he afterwards found in the possession of Bradley. The defendant had been engaged in working in and rafting timber on this lake and bayou for several years, and he testified that he secured the logs which Nowlin claimed to own from a person by the name of Parrish. He testified that Parrish came to him, and wanted to know if he wished to buy some timber from him, and that later he met Parrish at the bayou. Parrish then told him to wait there a minute, that he wanted to see a Mr. Coose. Presently Parrish returned, and said that he had bought timber (or logs) from Coose, and that defendant could have half of it if he would tow it out, which he agreed to do. He thereupon took the logs and sold same to Bradley, and claims that he obtained them in good faith. The evidence tended to prove that owners of timber would place their logs in this lake for the purpose of rafting the same to the river, and we think that there was some testimony to warrant the jury in finding that defendant took logs belonging to Nowlin, and that they were so marked that he knew that they did not belong to Coose or Parrish, and that he did not take them in good faith. The jury were the judges of the credibility of the witnesses, and it was their special province to determine whether the defendant took the logs in good faith or with the felonious intent to deprive the true owner thereof. And upon an examination of all the testimony in the case we think that there is some evidence to support the findings of the jury, as determined by their verdict. Under these circumstances the findings of the jury become conclusive.

After the lapse of the term at which the judgment of conviction was rendered, the defendant filed in this court a motion in the nature of a writ of error coram nobis for the purpose of

presenting certain evidence which he claims was newly discovered after the rendition of said judgment and the lapse of said term of the trial court. But this court can only review upon appeal matters which were presented before the trial court for its decision, and can not consider or entertain a motion to present evidence newly discovered after the lapse of the term at which the judgment of conviction was rendered. *Howard v. State*, 58 Ark. 229; *Beard v. State*, 79 Ark. 293.

In the trial court the defendant sought a new trial upon the ground of newly-discovered evidence. It appears that upon the trial of the case the witness Sam Bradley had in his possession certain logs which Nowlin identified as belonging to him. This witness, Bradley, was introduced by the State, and testified that these logs claimed by Nowlin were a part of the crib of logs which he purchased from defendant, Osborne. The newly-discovered evidence was that this witness subsequently claimed that upon the trial he misunderstood the question that had been propounded to him in this particular. He now stated that he understood that the question propounded to him was: "Were the logs that Nowlin claimed in the same tow that the logs were which he had purchased from defendant," and that he had answered only that question in the affirmative. The effect of the statement of the witness in the motion for a new trial was that the logs purchased by him from defendant were in the same tow as those logs claimed by Nowlin, but not that the logs so purchased by him from defendant were the same logs which Nowlin claimed, inasmuch as logs in this tow were secured by him from different parties.

Motions for a new trial based upon the ground of newly-discovered evidence are addressed to the sound discretion of the trial court, and this court will disturb its ruling only when it is apparent that such discretion has been abused. *Ward v. State*, 85 Ark. 184; *Anderson v. State*, 41 Ark. 229; *Armstrong v. State*, 54 Ark. 364.

There was other testimony adduced in the trial of this case, and given by the witnesses Nowlin and Campbell, from which the jury could have reasonably inferred that the logs which defendant had sold to Bradley, and which were identified while in his possession by Nowlin, were taken by defendant and afterwards sold to Bradley. So that the testimony of

Bradley was not the only testimony introduced at the trial from which the jury were warranted in finding that the logs sold by defendant to him were the identical logs which Nowlin claimed as his logs. The testimony of Bradley in this particular in the trial of the case was therefore only cumulative of other testimony adduced at the trial, and his newly-discovered testimony would only upon a new trial be contradictory in its nature. Newly-discovered evidence, which is only cumulative or contradictory, is not sufficient ground for a new trial. And in this particular this case is distinguished from the case of *Bussey v. State*, 69 Ark. 545. In this latter case it is said: "And even a confession of perjury on the part of a material witness does not necessarily call for a new trial when, eliminating his evidence, there is still other evidence to support the judgment." In the case at bar the jury were warranted in finding from the testimony of Nowlin and Campbell that these logs owned by Nowlin were in defendant's possession before he sold them to Bradley, and the defendant testified that he sold to Bradley logs which Nowlin saw in his possession. See *Douglass v. State*, 91 Ark. 492.

It is urged by defendant that he should be granted a new trial on account of alleged misconduct of the jury. The misconduct complained of is not that the verdict was made by lot, and the only witness presented by the defendant by whom he wished to establish the alleged misconduct of the jury was one of the jurors. But by section 2423 of Kirby's Digest it is provided that a juror can not be examined to establish a ground for new trial except to show that the verdict was made by lot. If the verdict was not decided by lot, and it is claimed that it was decided in any other manner than by a fair expression of opinion of the jurors, (under section 2422, sub. 3. of Kirby's Digest) such claim must be established by witnesses other than the jurors.

It is contended that the lower court erred in some of its rulings upon the instructions. We have carefully examined the instructions that were given and refused, and we do not find that the court committed prejudicial error in any of its rulings thereon. We do not think that it would serve any useful purpose to refer to these in detail. The court instructed

the jury correctly on all the essential ingredients of this crime under the testimony adduced upon the trial.

It is urged that the indictment fails to sufficiently describe the property claimed to have been stolen. The indictment described the property as "twenty-two sawlogs of the value of thirty-three dollars, and the personal property of W. R. Nowlin." In the case of *State v. Parker*, 34 Ark. 158, it was held that "twenty-five cords of wood" was a sufficient description of the property alleged to have been stolen in an indictment for larceny. And we think the description of the property in the indictment in this case is sufficiently definite so that the jury could have determined whether the property proved to have been stolen was the same as that upon which the indictment was founded. *Atchison v. State*, 90 Ark. 457.

Finding no prejudicial error in the trial of this case, the judgment is affirmed.

CLEVELAND-McLEOD LUMBER COMPANY v. McLEOD.

Opinion delivered October 31, 1910.

1. EVIDENCE—VARYING WRITING BY PAROL—DISTINCTION BETWEEN RECEIPT AND RELEASE.—While a receipt is only *prima facie* evidence of payment, and may be rebutted by proof that no payment was in fact made, a release, which is an express agreement in writing for a release of enumerated demands or of all demands, is binding unless set aside on account of fraud or mistake, and cannot be contradicted or varied by oral testimony. (Page 408.)
2. SAME—CONTRADICTING RECEIPT BY PAROL.—An instrument which contains no element of a release of all demands, but is merely an account for balance on claims and a receipt for the money paid in discharge thereof, may by parol evidence be shown not to have included a certain item. (Page 409.)
3. SAME—RES INTER ALIOS ACTA.—A judgment in a former suit between plaintiff and a stranger is inadmissible as an adjudication of plaintiff's rights, so far as concerned his claim in the action against the defendant. (Page 409.)
4. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—A question as to the validity of plaintiff's contract with defendant, not raised in the trial court, cannot be raised on appeal. (Page 409.)

Appeal from Sebastian Circuit Court, Fort Smith District;
Daniel Hon, Judge; affirmed.

Ira D. Oglesby, for appellant.

1. The contract between appellee and Cleveland, partners acting in their own interest, with themselves as officials of the corporation, the same not being ratified by the corporation, was illegal. *Morawetz on Corp.* § § 517-527; 84 Ark. 444; 91 Ark. 147.

2. There was testimony to support instruction No. 2, requested by appellant, and it should have been given. 90 Ark. 248; 87 Ark. 243; 76 Ark. 227; 77 Ark. 128; *Id.* 201; 76 Ark. 348; 69 Ark. 134; *Id.* 289; 67 Ark. 594; 68 Ark. 106.

3. The third instruction requested by appellant should have been given. The suit of Cleveland against McLeod settled all issues and questions decided in that case, and to what extent they affected appellee's right to recover in this case was a question for the jury. 89 Ark. 542; 83 Ark. 545.

C. E. & H. P. Warner and *Read & McDonough*, for appellee.

1. The contract is binding upon the appellant. That it received the lumber is evidence of ratification. Having received the benefits of the contract, it can not now repudiate it. 74 Ark. 190.

2. The court properly refused to give instruction No. 2. Receipts are not conclusive. 5 Ark. 62; *Id.* 558; 18 Ark. 78; 39 Ark. 583; 74 Ark. 288; 120 Ala. 221.

McCULLOCH, C. J. This is an action instituted by A. McLeod against the Cleveland-McLeod Lumber Company, a domestic corporation, to recover an amount alleged to be due on account, consisting of two items—\$1,000 for the purchase price of the plaintiff's interest in a lot of lumber owned by him and G. W. Cleveland, and \$153.84 for the price of another carload of lumber alleged to have been the property of plaintiff, but which was shipped by defendant to Fort Smith Chair Company. On a trial before a jury, a verdict was returned in favor of plaintiff for the sum of \$557.42, with interest from September 4, 1905. Judgment was rendered accordingly, and defendant appealed.

The principal contention here is that the evidence does not sustain the verdict. There is a sharp conflict in the evidence; the case having gone to the jury mainly on the testimony of the plaintiff and G. W. Cleveland. The jury has settled the issue in favor of the plaintiff, and the only question on this branch of the case for us to decide is whether or not his testimony, giving it its strongest probative force, was sufficient to sustain the verdict.

The facts which his testimony tended to establish are that he and Cleveland entered into a contract to purchase lumber for resale, he to furnish the money and the profits to be divided equally between them after his money should be refunded, with 10 per cent. interest. Pursuant to this contract, they accumulated a considerable amount of lumber, the greater portion of which was resold from time to time. Before all the lumber was sold, the defendant corporation was organized, and the plaintiff and Cleveland were stockholders therein and managing officers thereof, there being, however, other stockholders. Plaintiff testified that he had a conversation with Cleveland, representing the company, who stated that there was \$1,200 or \$1,500 worth of the lumber belonging to them remaining on the yards; and that they entered into a contract whereby he was to take credit on the books of the corporation for \$1,000. He states that he afterwards had a conversation with Mr. Speer, of Fort Smith, who was a director in the corporation, and he expressed his assent to the deal; and that subsequently he told Cleveland what Speer had said, and that he agreed to close up the lumber deal in that way, viz., that plaintiff was to be credited with \$1,000 on the books of the corporation, and that the Cleveland-McLeod Lumber Company was to have and ship out what was on the yard and what was to come in.

Cleveland gives an entirely different version of the matter in his testimony, but, as already stated, we must treat that conflict in the testimony as settled by the verdict of the jury. It was sufficient to warrant a verdict in favor of the plaintiff for the \$1,000 item sued on. It is unnecessary to consider the other item, inasmuch as the jury manifestly declined to allow it. If the jury accepted the testimony of plaintiff, instead of Cleveland's testimony, the verdict should have been for as much

as \$1,000, and defendant can not complain that it was less than that amount.

Prior to the institution of this suit there were other matters of accounts pending between plaintiff and defendant, and on November 24, 1906, they had a settlement in which the balance of \$802.50 was found to be due plaintiff, which was paid by check on a bank at Fort Smith. An account was made out and receipt signed in the following form:

"Cleveland-McLeod Lumber Company.

"Horatio, Ark., Nov. 24, 1906.

"Balance on account of all claims against the Cleveland-McLeod Lumber Company to this date.....\$802.50

"Received from Cleveland-McLeod Lumber Company the amount of check on back hereof in full payment of above account.

(Signature)

"A. McLeod.

"Cleveland-McLeod Lumber Company. No. 1859.

"\$802.50.

Horatio, Ark., Nov. 24, 1906.

"Pay to the order of A. McLeod—address, Fort Smith, Arkansas—eight hundred two and 50-100 dollars.

"Cleveland-McLeod Lumber Company.

"Per G. W. Cleveland, Secretary.

"To First National Bank, Fort Smith, Arkansas."

The plaintiff testified that the item of \$1,000 was not embraced in this settlement, but that on the contrary it was expressly understood that that item was omitted from the settlement, and was to be subject to further negotiations. Defendant asked the court to give the following instruction, which request was refused:

"2. If the evidence shows that plaintiff claimed the items sued for and other items against defendant, and that defendant had claims against plaintiff, and afterwards a settlement was made between plaintiff and defendant, and the sum of \$802.50 was on November 24, 1906, paid plaintiff as balance of account of all claims against the Cleveland-McLeod Lumber Company to this date, then plaintiff is not entitled to recover for differences existing prior to the said settlement."

This ruling of the court is assigned as error. It is settled by authorities too numerous to mention that a receipt is

only *prima facie* evidence of payment, which may be rebutted by proof that no payment was in fact made. A release, however, stands upon a somewhat different footing; and where there is an express agreement in writing for a release of enumerated demands or of all demands, this, like other contracts, is binding unless set aside on account of fraud or mistake, and can not be contradicted or varied by oral testimony. *Burton v. Merrick*, 21 Ark. 357; *Kahn v. Metz*, 88 Ark. 363; *Cache Valley Lumber Co. v. Culver Lumber Co.*, 93 Ark. 383.

It will be observed, however, from the wording of the writing executed by plaintiff, that it contains no element of a release of all demands. It is merely an account for balance on claims and a receipt for the money paid in discharge thereof. It does not purport to release all demands, and it was competent to show, without violating any rule of evidence, that the item sued on was not one of the items of the account in satisfaction of which the payment was made and the receipt given. The instruction asked was based on the theory that the receipt was conclusive in settlement of all demands which existed between the parties, and it was therefore erroneous, and the court properly refused to give it.

Defendant introduced in evidence the record of a former suit between G. W. Cleveland and the plaintiff, and asked the court to give an instruction telling the jury that all questions involved in that suit were conclusive upon the plaintiff in the present action. The court refused to give such an instruction, and this is also assigned as error. The court was correct in this ruling, for the former action was between plaintiff and another party, and therefore it was not binding on the plaintiff in this case. The court properly admitted the record in evidence to go before the jury for what it was worth as an admission of plaintiff, but it had no force whatever as an adjudication of the plaintiff's rights, so far as concerned his claim in this action against the defendant.

Plaintiff was, as before stated, one of the managing officers of the defendant corporation at the time the alleged contract was made, and it is now contended for the first time that his contract was illegal and unenforceable for that reason. No such question was raised below, either in the pleadings or the in-

structions of the court. The case was submitted to the jury entirely upon other defenses, and it is too late now to raise the question in this court for the first time.

The judgment is therefore affirmed.

SHIBLEY v. FORT SMITH & VAN BUREN DISTRICT (1).

STARBIRD v. FORT SMITH & VAN BUREN DISTRICT (2).

CHASTAIN v. FORT SMITH & VAN BUREN DISTRICT (3).

SHIBLEY v. FORT SMITH & VAN BUREN DISTRICT (4).

Opinion delivered October 31, 1910.

1. COUNTY COURTS—JURISDICTION—BRIDGES.—Section 28, art. 7, Const. 1874, conferring upon county courts "exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, etc.," is not violated by Acts 1909, c. 119, authorizing parts of Sebastian and Crawford counties to be constituted as the Fort Smith and Van Buren District for the purpose of building a free bridge across the Arkansas River between Fort Smith and Van Buren, and providing that, after the bridge is constructed, the county courts of Crawford County and of the Fort Smith District of Sebastian County may take it over and maintain it as a public highway. (Page 414.)
2. LOCAL IMPROVEMENT—BRIDGE.—A public bridge, as well as a street in a city or a highway in the country, is of great benefit to the traveling public, but it may also be of special benefit to adjoining lands so as to justify special assessments thereon to defray the expense of its construction. (Page 416.)
3. SAME—AREA.—There is nothing in the Constitution which forbids the creation of an improvement district embracing parts of two counties. (Page 417.)
4. SAME—TAXATION—UNIFORMITY.—The constitutional requirement of uniformity in taxation is satisfied when assessments for local benefits are imposed with substantial or approximate equality upon all standing in like relation. (Page 418.)
5. SAME—ASSESSMENT—CONCLUSIVENESS.—Acts 1909, c. 119, § 7, providing that the assessment of benefits in the two localities upon opposite sides of the Arkansas River should "bear the same proportion to each other which the assessments of real estate in said divisions of said district bear to each other as determined by the last county assessment of said divisions of said district," is a legislative determination that the two localities will be benefited in the same proportion that their assessments

bear to each other, and will be binding in the absence of any showing that this determination was incorrect or unjust. (Page 419.)

6. **SAME—LIABILITY OF HOMESTEAD.**—Special assessments for local improvements are “taxes” within section 3, art. 9, Const. 1874, providing that homesteads shall not be subject to the lien of any judgment or to sale under execution except, among other things, for taxes. (Page 420.)
7. **SAME—TAX AS PARAMOUNT LIEN.**—Acts 1909, c. 119, providing that the lien for assessments shall be superior to the liens of prior mortgages, etc., does not impair the obligation of contracts, as every property owner holds his property subject to the exercise of the taxing power. (Page 431.)
8. **SAME—CONSENT OF LAND OWNERS.**—While the Constitution requires that the creation of improvement districts in cities and towns must be based on the consent of a majority in value of the property owners, no such constitutional requirement is imposed in the case of improvement districts formed outside of cities and towns. (Page 422.)
9. **SAME—CONCLUSIVENESS OF COMMISSIONERS’ FINDING.**—Acts 1909, c. 119, § 5, providing that the commissioners therein provided for shall find whether the petition for the proposed improvement contained a majority in value of the land owners of said district, and shall so declare, and shall proceed to carry out the act, the finding of the commissioners upon this subject is conclusive, and cannot be reviewed by the courts. (Page 424.)
10. **SAME—PUBLIC BRIDGE—GRANT OF RIGHT-OF-WAY OVER.**—Acts 1909, c. 119, § 2, 39, is not void for providing that the commissioners of the Fort Smith and Van Buren District shall have the power to grant a right-of-way over said bridge to any public utility, and to receive rents therefor, but that such concession shall not interfere with the reasonable use of such bridge as a public highway. (Page 425.)

First case on appeal from Sebastian Chancery Court; the second case from Crawford Chancery Court; *J. Virgil Bourland*, Chancellor, in first two cases; third and fourth cases on appeal from Crawford Chancery Court; *Jeremiah G. Wallace*, Chancellor, in last two cases, on exchange of circuits; affirmed.

Mehaffy & Williams, Carmichael, Brooks & Powers, Sam R. Chew, C. A. Starbird and J. E. London, for appellants.

1. The act is repugnant to section 28, art. 7, of the Constitution, which confers *exclusive* original jurisdiction upon the county courts in *all* matters of bridges and other internal improvements. 89 Ark. 513; 48 Ark. 370; 57 Ark. 555; 60 *Id.* 95; 4 Words & Phrases, p. 3877.

2. Local assessments must be uniform and apply alike to all property similarly situated. 48 Ark. 370; 48 *Id.* 251; 172 U. S. 269; 2 Ark. 289, 296; 57 *Id.* 554-9.

3. The Legislature can not create districts which could lend their aid to railways and street car companies. Art. 12, § 5, Const.; 172 U. S. 269. Taxation in excess of special benefits is taking property without due process of law. 172 U. S. 269; 71 Am. St. 884; 45 L. R. A. 291; 68 Am. St. 717.

4. Liens can not be created upon homesteads. Art. 9, § 3, Const.; 65 Ark. 503; 21 *Id.* 41.

5. The question of a majority in value is jurisdictional. 59 Ark. 358; 50 *Id.* 116; 59 Cal. 206; 117 U. S. 683-9 (Law. Ed.); 168 U. S. 236 (Law. Ed.) 451; 68 Fed. 961; 2 Page & Jones on Tax., § 781.

6. The finding of the commission is not conclusive. 71 Ark. 556.

7. The act violates section 1, article 16, of the Constitution. Gray on Lim. of Tax. Power, 230; 4 S. W. 330; 3 Am. Rep. 615; 8 *Id.* 255; 69 Pa. St. 352.

8. A bridge can not be made the subject of a local improvement to be paid for by local assessments, as it is a matter of *general* benefit to the public. 74 Md. 116; 39 N. J. L. 656; 85 Pa. St. 163.

9. Sebastian County's two districts are practically two counties, which can not be embraced in one improvement district.

Hill, Brizzolara & Fitzhugh, for appellee.

1. When the Legislature acts itself, its act is conclusive alike of the question of the necessity of the work and of the benefits against the property assessed, and it is not open to the court to review its action. 164 U. S. 112, 175; 170 *Id.* 304; 83 Ark. 54; 172 U. S. 269. A bridge across a navigable stream is a proper subject-matter of an improvement district. 1 Page & Jones on Special Assessments, § § 359, 419; 170 U. S. 304; 68 Conn. 131; 64 Vt. 28; 50 Minn. 248; 103 Mass. 129; 104 Mass. 236; 6 Allen, 353.

2. The Legislature may create a district embracing two counties. 68 Conn. 131; 170 U. S. 304; 153 Mass. 566. It can also apportion the expense or cost. 153 Mass. 566; 178 *Id.*

213; 104 *Id.* 236; 103 *Id.* 129; 6 Allen 353; 166 *Id.* 347; 64 Vt. 28; 50 Minn. 248; 52 N. W. 858; 20 Minn. 74; 37 Atl. 158; 13 R. I. 50; 55 N. J. L. 258; 160 Ind. 533; 35 N. W. 545; 47 *Id.* 11; 43 *Id.* 946; 127 Ill. 581; 207 *Id.* 11; 1 Page & Jones, Taxation Assessment, § 61; 2 *Id.*, § 664, 704; 125 U. S. 345; 83 Ark. 344; 15 Kan. 500; 69 Ark. 436; 205 U. S. 135.

3. Nonresident owners can legally sign the petition. 71 Ark. 556; 90 *Id.* 29.

4. A failure to provide for an appeal or that notice be given of meetings of the commission does not avoid the act. Kirby's Digest, § 6998; 49 Ark. 518; 214 U. S. 359; 86 Ark. 231; 209 U. S. 414; 210 *Id.* 373; 80 Ark. 462, 318.

5. The Legislature may make the action of the commission in finding that the petition was duly signed by a majority in value, etc., conclusive. 78 Ark. 432, 463; 72 Ark. 205; 84 *Id.* 390; 72 Ark. 432; 32 *Id.* 553; 40 Ia. 226; 37 *Id.* 78, 598; 62 Mich. 456; 1 Metc. (Ky.), 533; 122 Cal. 442; 130 Ind. 514; 108 *Id.* 443; 27 Atl. 66; 112 Ind. 361; 21 How. 539; 92 U. S. 484; 94 *Id.* 104.

6. The act is not repugnant to article 7, section 28, of the Constitution. 89 Ark. 513.

MCCULLOCH, C. J. The General Assembly of 1909 passed an act authorizing the construction and maintenance, through an organization in the nature of an improvement district, of a public bridge across the Arkansas River at Van Buren, Arkansas, where that river constitutes the boundary line between Sebastian and Crawford counties. The first section of the act, which sets forth the purposes of the organization, and prescribes the bounds of the district created, reads as follows (Acts, 1909, c. 119):

"Section 1. That Upper Township of Sebastian County and all of Crawford County, except the following townships, to wit: Winfrey, Sand Point and Shepherd, be and the same is [are] hereby created and constituted a bridge district; and said district shall be known as the Fort Smith & Van Buren District, and shall be a public agency and a body politic and corporate under said name and style, and by that name may sue and be sued, plead and be impleaded, and have perpetual succession for the purposes hereinafter designated. The said district may have a common seal, and may make such bylaws and regula-

tions from time to time as may be deemed proper, not inconsistent with this act or the laws of this State, for the purpose of carrying into effect the objects of its creation. And said district may appoint all officers and agents which it deems necessary and suitable for the conduct of the business of said corporation, and may do all other acts and things not inconsistent with the laws of this State which may be proper to carry into effect the purposes and objects of this act. For the purpose of convenience of description, Upper Township shall be described herein as the Sebastian Division of said district, and all of Crawford County except the townships hereinbefore named shall be described as the Crawford Division of said district."

Subsequent sections prescribe the manner of organization, etc., and authorize the construction of the bridge upon petition found to contain the signatures of a majority in value of the owners of real property in the district. It also provides for levying and enforcing the collection of assessments on property in the district benefited by the improvement to defray the cost of constructing and maintaining the bridge. There are other provisions of the act which will be mentioned later in this opinion.

A petition asking for the improvement was duly filed with the commissioners of the district, which was found to contain a majority in value of the owners of the real property, and the commissioners were proceeding to form plans and let a contract for the construction of the bridge, and to levy assessments on the property benefited, when several actions were instituted in the chancery courts of Sebastian and Crawford counties by owners of property in those counties to restrain them from doing so. The complaint in each case was dismissed for want of equity, and the several plaintiffs appealed to this court. The validity of the statute is attacked on several points, and each of the cases will be disposed of in this opinion.

The first point of attack to be noticed is that the act is repugnant to section 28 of article 7 of the Constitution, which confers upon county courts "exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries * * * and in every other case that may be necessary to the internal improvement and local concerns of the respective coun-

ties." In support of this contention, the case of *Road Improvement District No. 1 v. Glover*, 89 Ark. 513, is relied on, wherein it was held that "counties can not be organized into districts for building, repairing and maintaining roads without usurping the exclusive jurisdiction of roads vested in the county court by the Constitution," and that "districts can not be formed or authorized to lay out and establish new public roads, and impose upon the county court the duty to maintain them." It was not held that the Constitution withholds from the Legislature the power to authorize the construction, as local improvements, of new roads to be paid for by assessments on property to be benefited, nor is there a justifiable inference to be drawn from the decision that the court should hold that the Legislature can not authorize the construction of a bridge as a local improvement. The reason given by the court for the ruling was that to put the whole county into a road improvement district would be to substitute the commissioners or board of directors for the county court in the exercise of jurisdiction over the roads, and that it would be a usurpation of the county court's jurisdiction to authorize the construction of a new public road as a local improvement and thrust it upon that court for maintenance as a part of the public road system of the county. We perceive no sound reason why the Legislature may not, without trenching upon the jurisdiction of the county court, authorize the construction of new roads and bridges as local improvements. It does not impose upon the general public the burden of maintaining the improvement, nor does it fasten upon the county court the duty of supervising and maintaining the new road or bridge as a part of the internal affairs of the county. The statute now under consideration, by its express terms, is rescued from such an objection, for it provides that the county courts of said counties *may* take over and acquire the bridge after it had been constructed, and maintain it as a public highway, but that, in the event the county courts do not decide to take it over, then it shall be maintained by levying annual assessments on the property benefited. It is left entirely optional with the county courts of the two counties whether or not the control of the bridge shall be taken over, and this provision leaves unim-

paired the jurisdiction of the county court over the bridge when it has seen fit to exercise that jurisdiction.

This conclusion leaves out of consideration the fact that the bridge is to span a navigable river which is the boundary between two counties, and that it is not and can not be wholly within the jurisdiction of the county court of either county. The result would be the same if it were a bridge to be erected wholly within the bounds of one county; for we are of the opinion that, even under those circumstances, its construction may be authorized as a local improvement. The construction of an improvement under those circumstances would not be an invasion of the jurisdiction of the county court.

This brings us to a consideration of the kindred question raised in the cases, that a bridge can not be made the subject of a local improvement, to be paid for by local assessments, for the reason, as alleged, that it is in its nature of a general benefit to the public at large, and should be constructed by general taxation. Whilst it may be true that the benefits which flow from almost all local improvements, which are usually authorized to be constructed at the expense of local property-owners—street pavements, sewers, public parks, waterworks, in cities and towns, levees built for the protection of overflowed lands—all inure to the benefit of the general public to a greater or less extent, yet it is not true that a bridge, any less than improvements of the other kinds mentioned above, does not produce special benefits to adjoining lands so as to justify special assessments to defray the expenses of such improvements. A bridge for the use of the public, like a street in a city or a highway in the country, is undoubtedly of great benefit and convenience to the traveling public; nevertheless, it may be also of special benefit to adjoining lands and a fit subject for construction from the proceeds of local assessments. It is settled that improvement districts "are based and sustainable only upon the theory that the local assessments levied to sustain them are imposed upon the property of persons who are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment." *Rector v. Board of Improvement*, 50 Ark. 116; *Road Improvement District No. 1 v. Glover*, *supra*.

Note the words, "*specially and peculiarly benefited.*" The benefits need not be exclusive. The general public may also derive benefits in more remote degree, yet, if there is a special and peculiar benefit inuring to the adjoining property, local assessments are justified. A fair illustration of this is found in the decision of this court in *Matthews v. Kimball*, 70 Ark. 451, where a public park in the city of Little Rock was held to be a local improvement within the meaning of the Constitution and statutes, and that the whole city could be embraced in an improvement district and all the real property therein taxed to pay for such improvement.

There is another contention, easily disposed of, that the act is void because it attempts to create an improvement district embracing parts of two counties. We see nothing to hinder this, either from a practical or constitutional standpoint. There is nothing in the Constitution which forbids. The act creates a distinct governmental agency, separate and apart from the county governments, to perform a specific function and to accomplish a particular end. It does not disturb the autonomy of the respective counties, nor impair them in the exercise of their governmental functions.

The following language of Judge Mitchell in delivering the opinion of the court in *Maltby v. Tautges*, 50 Minn. 248 (52 N. W. 858), is applicable not only to this but to other questions in the present case: "If a certain territory is specially interested in a highway or bridge, but some localities in that territory interested more than others, there is nothing in the way of the Legislature imposing the burden of the expense on the territory thus specially interested, regardless of the lines of political subdivisions of the State, and of apportioning that burden among the different localities in that territory in accordance with their respective interests, and establishing different taxing districts for that purpose. The power of taxing and the power of apportioning taxes are inseparable."

The following basis of assessments is fixed in section 7 of the act as follows: "Immediately after ascertaining the cost of the public improvement contemplated by this act, the commission shall appoint six assessors, three of whom shall reside in the Crawford division, and three of whom shall reside in the Sebastian division of said district. Each of said as-

sessors shall, before entering upon the discharge of his duty, take an oath to well and truly assess, to the best of his ability, the value of all benefits to be received by each land owner by reason of the proposed improvement as affecting each tract of land within said district. They shall ascertain the value of the real property within said district without said improvement, and the value thereof as benefited by said improvement, and shall charge against each lot, tract or parcel of real estate in said district an assessment according to the value of the benefit that will accrue to it by reason of the construction of said bridge; provided, however, that the assessment of benefits against each of the aforesaid divisions of the district shall bear the same proportion to each other which the assessment of real estate in said divisions of said district bear to each other, as determined by the last county assessment of said divisions of said district."

There is another limitation in the statute as to the amount of assessments, to the effect that the cost of improvements shall not exceed 10 per cent. of the valuation of real property in the district as shown by the last county assessments. It will be seen, therefore, that the basis of assessments prescribed by the act is fixed, that the ratio of assessments between the two divisions of the district shall be proportionate to the assessments of the real property in the respective divisions according to the last county assessments for taxation, the result being that the cost of the improvement is to be imposed on the property in the two divisions of the district in the "same proportion to each other which the assessment of real estate in said divisions of said district bear to each other," and the portion thus imposed on each division is to be assessed against lands in that division according to estimated benefits to each tract. To employ an illustration used by counsel in argument, as the total county assessments of real estate in the respective divisions bear to each other the proportion of 70 to 30, therefore 70 per cent. of the cost of the improvement will be apportioned to the one division and assessed against the lands therein according to benefits, and likewise 30 per cent. to the other division.

It is earnestly insisted that this division arbitrarily imposes a given amount of the cost of improvement on the lands

of the respective divisions without regard to the relative benefits, and thus destroys uniformity in apportioning the burden of taxation. It is said, as an illustration of the alleged evils of the scheme, that lands in one division of the district may be assessed 100 per cent. of the estimated benefits, whilst lands in the other division may escape with assessments of less percentage of the estimated benefits.

Conceding that the constitutional requirement of uniformity and equality applies to assessments for local improvements outside of cities and towns—which seems to be settled by the decision of this court in *Davis v. Gaines*, 48 Ark. 370—it becomes necessary to ascertain what powers the Legislature possesses in determining the standard of uniformity in such matters. In the outset it must be remembered that precise uniformity is not always obtainable, and the law does not exact absolute accuracy in that regard. Substantial or approximate equality and uniformity only is required, for no greater degree of precision is practicable, not to say possible, in most instances. 1 Cooley on Taxation, 257. The constitutional requirement of uniformity is satisfied when assessments are imposed equally upon all standing in like relation. *Cribbs v. Benedict*, 64 Ark. 555; *Fort Smith v. Scruggs*, 70 Ark. 549.

It was within the power of the Legislature to have assessed the cost proportionately upon the lands of the district according to the legislative estimate of benefits, without assigning that duty to the commissioners of the district. *Sudberry v. Graves*, 83 Ark. 344; *Spencer v. Merchant*, 125 U. S. 345.

Now, since the Legislature possessed that power, it could, upon its own estimate of benefits, apportion the cost of the improvement to the separate parts of the district without violating the rule of uniformity. Here we have a plan for the construction of a bridge which connects two localities upon opposite sides of a navigable stream. As said by the Supreme Court of the United States in such a case: "It may frequently happen that a bridge or causeway across the boundary line between two counties may be a vital necessity to one and of little use to the other." *Washer v. Bullitt County*, 119 U. S. 558. Each tract of land may separately derive a certain

benefit from the whole improvement, and yet the relative benefits in the aggregate between the lands on different sides of the river may accrue in a different proportion to the cost of the whole improvement. This inequality was within the province of the lawmakers to correct, by making the lands on each side of the river bear the just proportion of the whole cost of the improvement in accordance with the relative benefits to be received in the aggregate by lands in each of the localities affected. It does not violate the rule of uniformity, but on the contrary conforms to it. We have in this statute the legislative determination that the two localities upon opposite sides of the river will be benefited in the aggregate in the same proportion to each other that the assessments for county taxes bear to each other. It is not shown that this determination was incorrect or unjust, and we can not say that the Legislature arbitrarily abused its powers in thus estimating the proportionate benefits. It has seen fit wisely to safeguard the interests of land owners by providing in effect that, after the apportionment of benefits has been made to the two divisions of the district, the assessment against each particular tract of land shall not exceed the estimated benefit to accrue to it from the improvement.

It is next contended that homesteads outside of cities and towns are exempt from assessments for local improvements, and that, as the act attempts to create liens on homesteads, it is unconstitutional and void. If it be true that homesteads are exempt from such assessments, it is impossible to authorize local improvements outside of cities and towns by special assessments, for the exemption would destroy the uniformity of assessments, and thus render the whole scheme void. *Davis v. Gaines, supra*. The constitutional provision on the subject of homestead exemptions reads as follows: "The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to the sale under execution or other process thereunder except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same or for taxes or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of an express trust for

moneys due from them in their fiduciary capacity." Section 3, article 9, Constitution.

This court, in *Ahern v. Board Improvement District*, 69 Ark. 68, speaking of assessments for local improvements in cities, said: "Those assessments, though differing in some respects from taxes for general purposes, are yet authorized under the taxing power. If so, so far as the mere exercise of power is concerned, the same rule applies as in cases of taxes." The court then proceeds to hold in the same case that a homestead in the city is not exempt from improvement assessments for the additional reason that no provision of the Constitution authorizes special assessments for local improvements. That decision clearly holds, in addition to the reason last mentioned, that a homestead is not exempt for the reason that the lien for special assessments falls within the exceptions as to taxes in the homestead clause. This court has also held, it is true, that for some purposes a local assessment is not a tax within the meaning of the term. *Sanders v. Brown*, 65 Ark. 498; *Paving District v. Sisters of Mercy*, 86 Ark. 109. But the word "tax" may be, and sometimes is, susceptible of a different meaning when used in a different connection, according to the manifest intention of the framers of the Constitution. When the Constitution of 1874 was framed, the plan of constructing levees as local improvements, to be paid for by special assessments on the lands to be affected thereby, was a part of our legislative scheme. At that time laws stood on the statute books providing for the organization of levee districts and authorizing special assessments to defray the cost of construction of levees. Therefore, it is not believed that the framers of the Constitution intended to abrogate those laws and render them void by an exemption of homesteads from special assessments, thus destroying the uniformity of such assessments. It is obvious that the framers of the Constitution used the word "tax" in the homestead provision as meaning all assessments or impositions authorized under the taxing power.

In one of the cases before us the point is made that the act is void because it attempts to impair the obligation of existing contracts by making the liens for assessments superior

to the liens of prior mortgages, etc. This question is well settled by the authorities against the contention, and need not be further discussed. Gray, Limitations of the Taxing Power, § 1188. In *Wabash Eastern Railway Company v. Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, the correct view of this question is aptly stated, as follows: "Every property-owner holds his property subject to the exercise of the taxing power, and it is immaterial, so far as this question is concerned, what may be the nature of his interest, whether the fee, an estate in expectancy, an estate for years, or a mere lien. This is true, as every one must admit, in relation to general taxes where the only return to the taxpayer is the protection and security which the government gives him, and, *a fortiori*, should be true in case of special assessments, where, in theory at least, he receives an adequate and complete return for the money assessed in the enhanced value of the estate or property which he owns, or to which his lien attaches."

It is alleged in one of the complaints that the names of certain corporations owning property in the district were signed without authority to the improvement petition, and that, omitting the names of those corporations from the petition, it did not contain a majority in value of the owners of all the real property in the district. It is therefore contended that this is jurisdictional, and that the Legislature could not, as it attempted to do, make the findings of the commissioners upon the question conclusive. The section of the statute bearing upon this question is as follows:

"Sec. 5. Immediately upon the organization of said commission, or as soon thereafter as is convenient, they shall give public notice of the passage of this act and of their organization, and the purposes of said act, and that the public improvement herein contemplated is conditioned upon its approval by a majority in value of the owners of real estate within said district. If, at any time within three months from the passage of this act, a petition or petitions purporting to be signed by a majority in value of the owners of real property within said district is filed with said commission, the commission shall give public notice of said fact in at least one newspaper published in Fort Smith and at least one newspaper published in Van

Buren, and set a day and place for the hearing not less than twenty days after the first publication of said notice; and at said place and time, so designated, the commissioners shall examine the petition or petitions filed, and examine the assessment of the real property within said district, and, for the purposes of said hearing, may adjourn from day to day, or from time to time, until said hearing is completed, at which hearing any land owner in the district may be heard and evidence may be taken in such manner as the commission may deem proper to determine the facts as to whether said petition or petitions are signed by a majority in value of the land owners of said district, as shown by the last county assessments of the lands within said district.

"If at said hearing the commissioners shall find that the petition or petitions are not signed by a majority in value of the land owners of said district as shown by the last county assessment, they shall so declare, and such finding shall terminate all proceedings under this act.

"If said commission shall find that said petition or petitions are signed by a majority in value of the land owners of said district as shown by the last county assessment, they shall so declare and shall proceed to carry out the purposes of this act. And in either event public notice shall be given in at least one newspaper published in Fort Smith and in at least one newspaper published in Van Buren of said fact, and a copy of their findings shall be filed with the county court of Crawford County and the county court of the Fort Smith District of Sebastian County."

This court has decided several times that, as to improvement districts in cities and towns which are governed by the constitutional provision to the effect that assessments for local improvements must be based upon the consent of a majority in value of property holders, the consent of such majority is jurisdictional, and that the failure to obtain it is fatal to all subsequent proceedings. *Rector v. Board of Improvement*, 50 Ark. 116; *Watkins v. Griffith*, 59 Ark. 344; *Craig v. Waterworks Improvement District*, 84 Ark. 390.

Respecting this question, we see no distinction between an improvement district in a city or town and an outside one created

by the Legislature, where the statute governing the organization of the district makes the power to act depend upon obtaining the consent of a majority of the property owners. But in another respect there is a wide difference between improvement districts formed inside, and those formed outside, of cities and towns. The former must be created pursuant to and under the restrictions prescribed by the constitutional provision above referred to, whilst the power of the Legislature is unrestricted by the Constitution as to the creation of improvement districts outside of cities and towns. *Craig v. Waterworks Improvement District, supra*. The Legislature may lay out such districts at will and put them into full operation without obtaining the consent of property owners—even to the extent of directly levying assessments without the intervention of any other instrumentality, such as assessing boards, etc. *Sudberry v. Graves, supra*.

In the statute creating this district, the Legislature has not seen fit to make the power to proceed depend upon obtaining the consent of a majority of the property owners, but upon the ascertainment and declaration of the commissioners that the petition has been signed by a majority in value of the property owners. The power of the Legislature to directly put the district into operation, without obtaining the consent of the property owners, embraces the power to put it into operation by the ascertainment and declaration of the commissioners, at least where there is a provision for a public hearing before the commissioners on the question.

Moreover, it is a well settled principle of law that where the Legislature has erected a tribunal for the purpose of ascertaining and declaring the result of an election upon any subject, the decision of such tribunal is conclusive, and can not be reviewed by the courts. *Govan v. Jackson*, 32 Ark. 553; *Rice v. Palmer*, 78 Ark. 432; *Ryan v. Varga*, 37 Ia. 78; *Baker v. Board of Supervisors*, 40 Ia. 226; *Hipp v. Board of Supervisors*, 62 Mich. 456; *Simpson v. Commissioners*, 84 N. C. 158; *Cain v. Commissioners*, 86 N. C. 8; *Batman v. Megowan*, 1 Metc. (Ky.), 533; *State v. Harmon*, 31 Ohio St. 250; *Reclamation District v. Burger*, 122 Cal. 442; *Tucker v. Sellers*, 130 Ind. 514; *Scranton v. Jermyn*, 27 Atl. (Pa.) 66.

The circulation and presentation of a petition expressing the consent of the property owners is in the nature of an election, and the doctrine above announced as to the conclusion of the decision of a special tribunal determining the result applies to this proceeding as it does to a political election.

It is insisted by learned counsel for appellants that the case of *Board of Improvement District No. 60 v. Cotter*, 71 Ark. 556, conflicts with the conclusion we now express. We do not think so. There the court held that the statutory requirement that ten resident property owners must petition the city council before an improvement district in a city could be formed was jurisdictional, and that the question whether or not the district had been legally formed on such petition could be raised collaterally at any time. The governing statute in that case did not pretend to constitute the city council a tribunal to decide whether or not the petition was signed by the requisite number of resident property owners. The statute now under consideration expressly empowers the commissioners to decide the question whether or not a majority signed the petition, and in effect makes that decision final. It provides for a hearing by the commissioners, after giving public notice.

The case of *Rice v. Palmer*, *supra*, is directly in line with the Cotter case. In both the majority and dissenting opinion the doctrine was distinctly recognized that the Legislature could create a tribunal to decide the result of an election and make the decision of that tribunal conclusive, but the judges differed as to whether or not the Legislature had erected such a tribunal—the majority holding that it had not done so.

The act contains the following provision, the validity of which is attacked (section 2): "The commission shall have the power to grant a right-of-way over said bridge to any public utility upon such terms as the commission shall determine; provided, however, that the concessions which may be granted to public utilities shall not interfere with the reasonable use of such bridge as a public highway." Another section of the act (section 39) provides that the commissioners shall have power "to receive rents from the concessions heretofore authorized from the public utilities for the purpose of construction, repair or maintenance of the improvement herein contemplated."

It is alleged in one of the complaints that the commissioners have adopted plans and let a contract for building a bridge 61 feet wide, 18 feet thereof for the accommodation of the general public and the balance for the use of public utility corporations, such as steam and electric railways. It is admitted that in the plans for the construction of the bridge two-thirds of the floor space is set apart for the use of the general public and one-third for the public utilities, for which toll is to be charged. The case does not present the question whether or not the Legislature can authorize, as a local improvement to be paid for by assessments on adjoining property, the construction of a bridge for the exclusive use of a public carrier. The bridge is to be constructed for the use of the general public, and the provision for setting apart of certain space to the use of public utility corporations for hire is a mere incident. This gives an enlarged use of the bridge by the public, and we perceive no reason why this provision should be held to vitiate the statute. The enlarged use of the bridge augments the benefits to the property affected thereby—at least, the Legislature had the power so to determine, and it does not impose on the taxpayers the burden of constructing an improvement for the use of the corporations. The entire use of the bridge is, after all, for the benefit of the public, and the benefits are special to the property affected thereby within the sense that it is a local improvement. This idea is expressed by Mr. Justice Bradley in delivering the opinion of the Supreme Court of the United States, speaking of the power to grant a right-of-way over a public street or highway to street railway companies: "By the accommodation which they afford, the citizen can reside miles from his shop or place of business. Though attended with some inconvenience, they have greatly added to the efficiency of public thoroughfares, and have more than doubled their capacity for travel and transportation." *Barney v. Keokuk*, 94 U. S. 324.

We conclude that none of the attacks on the validity of the statute or on the proceedings of the commissioners is well founded, so the decree in each case is affirmed.

BATTLE, J., not participating.

WALSH v. HAMPTON.

Opinion delivered November 7, 1910.

1. COUNTIES—REMOVAL OF COUNTY SEAT—VALIDITY OF JUDGMENT.—Under Kirby's Digest, § 1115, providing, among other things, that it shall be unlawful to change any county seat until the place at which it is proposed to establish it shall be fully designated, "such designation embracing a complete and intelligible description of the proposed location, together with an abstract of the title thereto," etc., it was within the province of the county court to pass upon the sufficiency of such abstract of title, and any error of that court in deciding that question cannot be taken advantage of in a collateral attack. (Page 432.)
2. SAME—REMOVAL OF COUNTY SEAT—STATUTE.—Under Kirby's Digest, § § 1115, 1117, providing that it shall be unlawful to change a county seat until the place to which it is proposed to change the county seat shall be fully designated, including "the terms and conditions upon which the same can be purchased or donated by or to the county," an order for removal of a county seat is not invalid because the proposed terms of sale are not as advantageous to the county as they should have been. (Page 432.)
3. SAME—REMOVAL OF COUNTY SEAT—MODE OF ELECTION.—Under Kirby's Digest, § 1119, providing that the election [for removal of county seats] provided for in this act shall be understood in the same manner as general elections are required by law to be understood," the general election law applies to an election for the removal of a county seat. (Page 433.)
4. COUNTY COURTS—CONTROL OVER ITS ORDERS.—While the county court is authorized to vacate and expunge from its records an order entered at a previous term, which is absolutely void, it has no authority to review such orders which are not void, even though they are irregular on account of errors. (Page 434.)

Appeal from Dallas Circuit Court; *Henry W. Wells*, Judge; affirmed.

Robert Martin and *Miles & Wade*, for appellant.

1. A void judgment rendered by the county court can lawfully be vacated after the term in which it was rendered has expired. 89 Ark. 160; 23 Cyc. 697.

2. Any voter has the right to be made a party to the record to contest a county seat removal proceeding. 54 Ark. 409; 72 Ark. 394; 23 Cyc. 697.

3. The judgment was void because no sufficient abstract of title accompanied the petition. An abstract of title made more than one year prior to the filing of the petition is not

sufficient. Kirby's Digest, § § 1115, 1117; art. 13, § 3, Const. County courts must base action on the record before them. They can not take judicial cognizance of who are the owners of property. 52 S. E. 777; 70 Ark. 270-274; 11 Cyc. 371; 15 L. R. A. 501; 18 Fla. 842; 97 N. W. 103; 83 N. W. 483; 25 Ind. 422; 24 Wis. 49; 20 Tex. 16; 60 Me. 356. No deed was filed, conveying the land proposed for county purposes. 46 Ind. 96. A provision that an election be held to locate a county seat within a certain time after presentation of a petition therefor is mandatory. 10 Kan. 162; 6 Nev. 104. See also 29 W. Va. 63.

4. The judgment is void because there was no valid election. Art. 13, § 3, Const.; 67 Ark. 593; 47 Kan. 44; 15 Kan. 530; Kirby's Digest, § § 1117, 1119; art. 3 § 3, Const.; Kirby's Dig., § 2789; 126 Ala. 615; *Id.* 660; art. 8 § § 1, 2, Const. Ala.; 80 Ky. 557; 19 Fla. 538-9; 47 Ill. 482; 15 Cyc. 316. If the general election law applies so as to furnish the election machinery for the holding of an election for special purposes, in which is included a county site removal, why should the Legislature expressly provide who should conduct school elections? Kirby's Digest, § 7591. Who should conduct local option elections? *Id.*, § § 51, 118-19. Who should conduct an election for the surrender of a city's charter? *Id.* 5550-2. Who should conduct a road tax election? *Id.*, § 2791. Who should conduct an election for a constitutional amendment? *Id.*, § 2785. In connection with section 1119, Kirby's Digest, see also Mansfield's Digest, § § 1158 and 2695.

The removal of a county site is a local concern over which the county court has exclusive original jurisdiction. 33 Ark. 194.

T. B. Morton, for appellee.

1. When a county court has passed upon a county seat question and rendered judgment thereon, that judgment becomes final at the end of the term, and it has no jurisdiction to modify or change such judgment at a subsequent term. 1 Ark. 497; 2 Ark. 66; 5 Ark. 23; *Id.* 576; 6 Ark. 92; *Id.* 292; 10 Ark. 241; *Id.* 454; 12 Ark. 95; 14 Ark. 203; *Id.* 568; 22 Ark. 174; 24 Ark. 50; 25 Ark. 212; 33 Ark. 454; 36 Ark. 513; 52 Ark. 316; 60 Ark. 155; 89 Ark. 160; 92 Ark. 388; 27 Ark. 214. The

petition did not set up a cause of action within the jurisdiction of the county court. It does not set up whether appellant voted for or against removal, nor in what respect it affected him. There was also a defect of proper parties, both plaintiff and defendant. Kirby's Digest, § § 5999, 6007, 6008; 15 L. Ed. (U. S.), 500, note.

2. The three judgments of the county court of which complaint is made are not void. 34 Ark. 105; 51 Ark. 34; 53 Ark. 476; 55 Ark. 323; 59 Ark. 483; 83 Ark. 236. If, however, it is held that the statutory requirements as to abstract of title, etc., are jurisdictional, it is contended that those requirements were complied with. The question of title to the designated property, both as to the abstract and deed, is committed to the judicial discretion of the county court. Kirby's Digest, § 1115. The petition sets up the fact that an abstract was filed, and same was filed with the petition, marked as an exhibit. The court had the right to pass upon the facts set up. 55 Ark. 565; *Id.* 323; 34 Ark. 105; 99 Am. St. Rep. 261; 106 *Id.* 23; 1 Pet. 328, 7 L. Ed. 164; 46 Ind. 96; 6 Pet. 691, 8 L. Ed. 547. The statute does not require that the deed be filed with the petition, but only that the petition show "the terms and conditions upon which the land can be purchased or donated by or to the county." Kirby's Digest, § § 1115, 1117.

3. The judgments of June 4, 1908, and of July 21, 1908, were valid. When the court ordered the election, directed that proper notices as required by law should be given thereof and that such election should be governed in all respects by the laws in such cases made and provided, it did all that was required of it. Kirby's Digest, § § 1117, 1118; 73 Ark. 238. Kirby's Digest, § 1119, not only meant to adopt section 2811, *Id.*, providing that "all elections by the people shall be by ballot," but also to adopt the entire election machinery of the election law. Kirby's Digest, § § 2763, 2764, 2765, 2766, 2792, 2793, 2800, 2804, 2849, 2850, 2853, 2854; 49 Ark. 227; 55 Ark. 324; 45 Ark. 401. When the returns of the election of July 15, 1908, were laid before the court, they were *quasi* records, conclusive of the result of the election until overcome by affirmative evidence impeaching their integrity. 50 Ark. 85; 73 Ark. 187; Kirby's Digest, § § 1121, 1125; 45 Ark. 400. The elim-

ination of Princeton after "for removal" had carried was lawful and proper. 53 Ark. 533; 61 Ark. 477.

MCCULLOCH, C. J. Appellant, O. C. Walsh, in the present proceedings instituted by him in the county court of Dallas County, attacks the validity of an order of that court for an election upon the question of the removal of the county seat, and also an order of removal made pursuant to the vote at the election. On June 2, 1908, petitions were filed in the county court asking that the county seat be removed from Princeton, one of them asking in favor of Fordyce and the other asking in favor of Carthage. On June 4, 1908, upon consideration of these petitions, the court ordered an election to be held on July 15, 1908. On July 21 the votes were canvassed, and it was found that there was a majority of the votes for removal, but a failure by the majority to select the point of removal, and the court made another order on that day, as provided by statute, for an election to be held on August 29, 1908, to decide which of the two points having received the highest number of votes, Princeton or Fordyce, should have the county seat. The result of the last election was found, upon a canvass of the votes, to be in favor of Fordyce, and an order was made by the county court on October 6, 1908, declaring the result of the election and ordering the removal in accordance therewith. Since that time the courts have been held at the latter place.

In July, 1909, appellant, as a citizen and taxpayer, presented to the county court of Dallas County, sitting at Fordyce, his petition asking that the former orders of the court concerning the removal of the county seat be set aside, alleging that the same were void on account of the court having no jurisdiction to make the same. On the same day appellees, who are also citizens and taxpayers, and who were of the original petitioners who asked for the removal of the county seat, appeared and asked to be made parties, and filed their plea resisting the order prayed for by appellant. The county court made an order in accordance with the prayer of the petition of appellant, declaring the former orders of the court void; and appellees appealed to the circuit court, where, on hearing of the matter, the petition of appellant was dismissed, and the

judgment of the county court appealed from was set aside. From this judgment of the circuit court the appellant prayed an appeal to this court.

There are three grounds assigned for the attack on the removal proceedings in the county court. The first is that no abstract of title accompanied the original petition to the court for an election. The statute governing proceedings as to the removal of a county seat reads, in part, as follows:

"Section 1115. Unless for the purpose of the temporary location of county seats in the formation of new counties, it shall be unlawful to establish or change any county seat in this State without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place or places at which it is proposed to establish or change any county seat shall be fully designated, such designation embracing a complete and intelligible description of the proposed locations, together with an abstract of the title thereto and the terms and conditions upon which the same can be purchased or donated by or to the county. Provided, the county court shall not order the election hereinafter provided for, unless it shall be satisfied that a good and valid title can and will be made to the proposed new locations, or one of them. * * *

"Section 1117. Whenever the qualified voters of any county in this State to the number of one-third thereof shall join in the petition to the county court of such county for the change or removal of the county seat, embodying in the petition the designation and abstract of title and the terms and conditions of the sale or donation, as provided for and required by section 1115, the county court shall order an election to be held at the several voting places in the county, directing that the proposition of the petitioners for the change or removal shall be submitted to the qualified voters."

It is alleged in appellant's petition that the only abstract of title, or what purports to be an abstract of title, filed with the original petition for removal bears the following certificate: "I hereby certify that in April, 1907, I carefully examined the records in the office of the county circuit clerk and recorder of Dallas County, Arkansas, and the within is, as I believe, a correct abstract of all conveyances or other instruments of record affecting the title, at that time, to the land described

in the title page hereto; and that no judgments appeared of record that might become liens on said lands, and that taxes had all been paid thereon. Since that time the right-of-way through said lands across the north end has been sold to the Chicago, Rock Island & Pacific Railway Company. Witness my hand this the 30th day of May, 1908. (Signed) T. B. Morton, Abstracter."

It is insisted that the certificate to the abstract is not complete, in that it does not certify that an examination of the records had been made by the abstracter down to the date of the abstract, and that it contained a correct abstract of all conveyances affecting the title to that date. It is contended that the filing of a perfect abstract of title was jurisdictional, and that the whole proceedings failed because of the alleged defect in the certificate. The statute above quoted expressly provides that the abstract of title shall accompany or be embodied in the petition for removal before the county court shall order an election; but it is within the province of the county court to pass upon the sufficiency of the abstract. Any error of the court in deciding that question does not affect the validity of the order, and such error can not be taken advantage of in a collateral attack such as this is. *Hudspeth v. State*, 55 Ark. 323. The county court in its order for an election passed upon the sufficiency of the abstract, and found that the law had been complied with in this respect.

The next objection is that the original petitioners did not file with their petition a deed conveying the property which they proposed to donate to the county for county purposes. The statute does not require that. All that is required by the statute is that the terms and conditions upon which the new location can be purchased or donated shall be set forth. In this case there was filed with the petition for removal a writing, signed by the owners of the property, proposing to convey it to the county upon certain terms and at a certain price. This was a sufficient compliance with the statute. The fact that the proposed terms of sale were not as advantageous to the county as counsel now contend they should have been did not affect the jurisdiction of the court to make the order.

The statute further provides (section 1122) that after the election, before the county court shall make any orders for

the removal, "or, if made, before they shall be executed, the vendor or donor of the new location shall make or cause to be made and delivered to the county judge a good and sufficient deed, conveying to the county the land or location so sold or donated in fee simple, without reservation or condition," etc. It is not shown in the present attack that this has not been done.

The next and last attack made on the validity of the order of the county court is that in ordering the election it failed to specify the mode in which and means with which the election should be held. The only provision in the statute concerning this is that "the election provided for in this act shall be understood in the same manner as general elections are required by law to be understood, and the poll books thereof shall be returned by one of the election officers," etc. (Section 1119). It is alleged that this provision of the statute is meaningless, that the general election law on the subject does not apply, and that the county court should, in its order, have prescribed the mode of election. The Legislature has not authorized the county court to fix the mode of election; and, unless it falls within the statute as a general election, then there can be no valid election for the removal of a county seat. We do not think this contention can be sustained. There was at the time of the enactment of this statute, and is now, a complete system of election laws providing for the holding of general elections. It creates the machinery for the holding of elections, and keeps the election officers continuously in office from one general election until the time for the appointment of new ones immediately before the next general election. It is obvious that the Legislature meant in the above quoted language that an election for the removal of a county seat should be understood to mean a general election, so as to come within the terms of the general election law, and to fall within the scope of the machinery set in motion for that purpose. Any other construction of the language would not only destroy its meaning, but would defeat the whole purpose of the statute; for, unless this effect be given it, it would be impossible, under existing statutes, for a county court to order an election for the removal of a county seat.

Appellees have insisted here that it was beyond the power of the county court to entertain appellant's petition to set aside the former orders. We are of the opinion, however, that if the former orders were void, it was within the province of the county court to consider the petition to vacate them. A void order is of no effect whatever, and the question as to where the court should be held was a matter within the jurisdiction of the county court; and if there appeared on the record of that court an order which was absolutely void, it was within the province of the county court at any time to vacate it and expunge it from the record. This does not, however, permit the court to review orders made at former terms which are not void, even though they are irregular on account of errors. In other words, the county court could at a subsequent term vacate a void judgment, but could not correct or set aside one because it was found to be erroneous.

Upon the whole, the judgment of the circuit court dismissing appellant's petition was correct, and the same is affirmed.

KIRBY, J., not participating.

WARD v. STURDIVANT.

Opinion delivered November 7, 1910.

1. APPEAL AND ERROR—EQUITY CASE—TRIAL DE NOVO.—Upon appeal in an equity case, the cause is tried *de novo*; and if, upon an examination of the whole case, it appears that the decree of the chancellor is correct, it will not be reversed, although it is based upon an erroneous conclusion of fact. (Page 439.)
2. JUDGMENT—CONCLUSIVENESS OF JUDGMENT OF REVIVAL.—A judgment of revival entered upon a *scire facias* is as conclusive as other judgments, and can not be collaterally avoided for mere error or irregularity; and, until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all parties thereto. (Page 439.)
3. SAME—REVIVAL—PARTIES.—A judgment in favor of the administrator of an estate as such, upon the closing of the estate, becomes the property of the heirs of the decedent, and should be revived in their names. (Page 440.)

4. **SAME—REVIVAL—CONCLUSIVENESS.**—One who failed to object at the trial to the revival of a judgment in his name as administrator, instead of in his name individually, cannot thereafter object. (Page 440.)
5. **SAME—REVIVAL—WHO MAY ENFORCE.**—Where, after an administration was closed, a judgment in favor of an administrator as such was revived in the name of such administrator, such judgment remains the property of the decedent's heirs, and may be controlled and enforced by them. (Page 440.)
6. **SUBROGATION—PAYMENT BY ADMINISTRATOR OF DEBT DUE TO ESTATE.**—If the representative of an estate pays to the estate an indebtedness due to it, he becomes equitably the owner of such claim. (Page 440.)
7. **JUDGMENT—LACHES.**—The right to enforce a judgment at law can not be lost by laches or by any delay short of the period of limitation fixed by the statute. (Page 441.)
8. **LACHES—WHEN INAPPLICABLE.**—The doctrine of laches applies only to equitable defenses interposed against the enforcement of equitable remedies; it does not bar the enforcement of a legal right, which alone is involved in the enforcement of a judgment at law. (Page 441.)

Appeal from Howard Chancery Court; *James D. Shaver*, Chancellor; affirmed.

Sain & Sain and *T. D. Crawford*, for appellant.

All the disputed facts in this case are settled by the court's decree in favor of appellant. That it erred in its findings of law appears from the findings of fact. The judgment of revivor upon the *scire facias* was as effective as an adjudication as other judgments, and can not be collaterally avoided for any mere error or irregularity. 2 Freeman on Judgments, § 448; 43 S. C. 440; 1 Edw. Ch. (N. Y.), 497; 35 Cyc. 1159. On a collateral attack, it will be presumed that plaintiff had authority to revive the judgment. Since in his final settlement as administrator appellant was charged with the amount of the judgment, he was thereby subrogated to all the rights of the estate in said judgment. If it was error to revive it in the name of B. Ward, administrator, it was not prejudicial. He was entitled to have the judgment revived. 43 Ark. 238; 51 Ark. 287; 16 La. Ann. 108, 79 Am. Dec. 568; 2 Rawle, 128; 19 Am. Dec. 629; 4 S. E. 148. Kirby's Digest, § § 5999, 6001; 92 N. W. 597-9; 2 Black, Judgments, § 951; 69 Am. St. (Mont.), 698; 74 Fed. 702; 1 Hill (N. Y.) 339; 164 Pa. St. 87; 11 Ia. 148; 94 N. C. 265. No formal assignment of the judgment from Ward, administrator, to Ward, individ-

ually, was necessary. He is in the same attitude as if he had paid debts of the estate with his own means. Sheldon on Subrogation, § 202; 3 Johns. Ch. 312. The doctrine of laches does not apply here. Laches is an equitable *defense*, the right to plead or take advantage of which is confined to claims for purely equitable remedies. 89 Ark. 23.

W. C. Rodgers, for appellee.

1. In all equity cases the trial here is *de novo*. 73 Ark. 187; 75 Ark. 72; 76 Ark. 153; 84 Ark. 172. And if the decree below was correct, it is immaterial what reasons were given in the finding of facts. 49 Ark. 20; 73 Ark. 418; 75 Ark. 107; 79 Ark. 594; 85 Ark. 1; 12 Utah 104; 52 Miss. 200; 15 Wis. 50. It was the duty of appellant's counsel to bring into the record all the evidence and to abstract it as well, if they would show error in the decree. 92 Ark. 622; 80 Ark. 259; 89 Ark. 249. Failing in this, the presumption is in favor of the correctness of the judgment. 87 Ark. 368; 82 Ark. 547; 129 S. W. (Ark.) 793; 90 Ark. 393; 81 Ark. 66.

2. "The right of subrogation is purely equitable; it can be enforced only in equity, and the remedy is subject to all the rules governing the enforcement of equities." 82 Ark. 407; 96 U. S. 659. No one can claim its benefits unless he asks it in his bill and states facts entitling him to the remedy. 112 U. S. 423. Since a court of chancery may impose terms as a condition of decreeing the right of subrogation, it is not unreasonable for the court to require of the person asking the relief to be diligent. 55 Ark. 85. A debt paid by an administrator is not assigned to him, but extinguished, and he has no right of subrogation to the rights of the original creditor. 3 Grant Cas. (Pa.) 192; 7 Watts (Pa.) 353.

FRAUENTHAL, J. This was an action instituted by the appellee to restrain the sheriff of Howard County from executing to the appellant, Bascom Ward, a deed to land sold under an execution issued upon an alleged void judgment claimed to be owned by said Ward. In his complaint appellee alleged that on February 18, 1895, the said Ward as the administrator of the estate of Susan Jones, deceased, recovered judgment against him before a justice of the peace of Howard County for \$50, and that in 1905 said Ward as such administrator

sued out of the circuit court of said county a writ of scire facias to revive said judgment, and that on February 16, 1905, said circuit court adjudged a revival thereof. He alleged that the administration of the estate of Susan Jones was finally closed in 1902, and that said Ward was not administrator of said estate at the time said scire facias was sued out to revive said judgment nor at any time thereafter. He further alleged that on December 23, 1908, said Ward in his individual capacity and without right sued out an execution in his own name on said judgment of revival, which was levied by said sheriff on land of appellee, which was thereunder sold to said Ward, and a certificate of purchase executed to him therefor. He alleged that said judgment of revival was void; and that, if it was valid, the judgment was the property of said estate and not of Ward, and that the execution issued thereon in the name of Ward individually was void. He further alleged that the land was his homestead, and was exempt from seizure or sale under said execution.

In their answer the appellants denied that the land was the homestead of appellee, and alleged that said Ward became the equitable owner of said judgment by reason of the fact that in his final settlement as administrator of said estate he was charged with said judgment.

The judgment rendered by the circuit court upon said scire facias to revive was as follows:

"B. Ward, Administrator, v. J. B. Sturdivant; Scire Facias to Revive Judgment.

"On this day comes the plaintiff, by his attorney, and presents and files in open court a writ of scire facias to revive a judgment rendered against J. B. Sturdivant on November 30, 1901, in this court in favor of B. Ward, as administrator, for the sum of \$50, which judgment has been in no wise reversed, annulled, set aside or satisfied, and, the defendant having accepted service of said scire facias upon him as is shown by his indorsement upon same and the defendant failing to appear herein and show cause why the judgment should not be revived against him, it is therefore considered, ordered and adjudged by the court that the judgment rendered in the justice of the peace court on the 18th day of February, 1895,

against J. B. Sturdivant, in favor of B. Ward, administrator, for the sum of \$50 be and the same is hereby revived and put in full force and effect."

The order of the probate court made upon the settlement of said Ward as administrator of the estate of Susan Jones, and by virtue of which he claims that the original judgment was charged to him was as follows:

"Estate Susan E. Jones, Deceased; B. Ward, Administrator.

"On this day proceeded to examine said settlement filed herein by B. Ward, administrator, and the exceptions to same by J. J. Nelson, guardian of Bettie Jones, insane, and the court, having heard the argument of counsel and being sufficiently advised, doth sustain said exceptions, in so far as pertains to the claim of F. Revell for \$6, which is disallowed, and the claim of John Marshall for \$104.28, which is disallowed for \$40, and that B. Ward, administrator, be charged \$50 for rent of 1894, which will leave the estate due the administrator 39-100 dollars. And it is further ordered that the rent for 1895, \$50, be turned over to the clerk of the court, who will appropriate same to paying the legal expenses of said estate, and from the remainder, if any, to pay B. Ward for taxes of 1894, paid by said estate and to redeem land of said estate forfeited for taxes. And the said B. Ward and his bondsmen are released from all liability to said estate."

The cause was heard by the chancery court upon the depositions of a number of witnesses and the above judgment of revival and said order of the probate court. The chancery court found that said Ward as administrator of the estate of Susan Jones, deceased, recovered judgment against appellee for \$50 on February 18, 1895, and that the judgment was revived by the circuit court on February 16, 1905, but that at the time the writ of scire facias to revive said judgment was sued out in the circuit court and said judgment of revival rendered the administration of said estate was closed by order of the probate court, and that said Ward was not then administrator of said estate. It found that appellee was not entitled to claim the land as a homestead. It further found "that said Ward was entitled to subrogation to the rights of the estate of Susan Jones to realize the said sum of \$50 from the plaintiff herein, J. B.

Sturdivant, but finds also that the right accrued in May, 1895, and that the defendant, Ward, has lost the right to claim subrogation by reason of his laches and delays without any excuse therefor being shown." The court thereupon entered a decree restraining the execution of a deed and any further proceedings under the sale of said land made by virtue of the execution issued on said judgment.

It is urged by counsel for appellants that all of the disputed questions of fact in this case are settled by the findings of facts made by the chancellor, and that the only question for this court to determine upon this appeal is whether or not the chancellor erred in his conclusions of law. We do not think this contention is correct. Upon the appeal of a case in equity to this court the cause is heard *de novo*. The appeal brings up the whole case, and this court passes upon the record as to the facts as well as the law. The findings of fact by the chancellor are not conclusive upon appeal. His findings are persuasive only, and this court reviews the evidence as in a case upon trial *de novo*. And if, upon an examination of the whole case, it appears that the decree of the chancellor is correct, it will not be reversed, although it is based upon an erroneous conclusion of fact. *Kelley v. Carter*, 55 Ark. 112; *Niagara Fire Insurance Company v. Boon*, 76 Ark. 153; *Parker v. Wells*, 84 Ark. 172; *Fordyce Lumber Company v. Wallace*, 85 Ark. 1.

This being an appeal from a decree in a case in equity, we have therefore examined the entire record, and have based our conclusion as to the merits of this cause thereon.

The sale of the land, which the appellee is seeking to set aside, was made under an execution issued upon a judgment of revival. That judgment was rendered in a proceeding by scire facias, and, after its rendition, it became as effective as an adjudication as other judgments. In a proceeding to revive a judgment by scire facias the defendant is bound to plead all matters of defense that he has just as he would in an ordinary suit. The judgment of revival is conclusive against all facts and defenses which existed before its rendition. In 2 Freeman on Judgments, § 448, it is said: "The effect of a judgment entered upon a scire facias as an adjudication does not differ from that of other judgments. It can not be collaterally avoided for

mere error or irregularity, and, until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all persons properly made parties thereto." *Helms v. Marshall*, 121 Ga. 769; *Babb v. Sullivan*, 43 S. C. 440; *Witherspoon v. Twitty*, 43 S. C. 348.

Upon the hearing of the proceeding to revive the judgment a plea could have been made that there was a defect of parties, if the administration of the estate in whose name the judgment had been recovered was finally closed. The judgment did not become discharged by reason of the fact that the administration was closed. Upon the closing of the administration the heirs of the decedent became the owners of the assets of the estate that were unadministered, and were then the proper parties in whose name the proceedings by scire facias could have been revived, if the judgment was still the property of the decedent. *Crane v. Crane*, 51 Ark. 287; *Beckett v. Whittington*, 92 Ark. 230.

But, having failed to raise any objection to the party in whose name the judgment of revival was rendered, the parties are now concluded thereby; and the judgment can be controlled and enforced by the heirs of said decedent, if said judgment was still the property of said estate when it was closed. But it is urged by counsel for appellant that Ward, as administrator of the estate of Susan Jones, charged himself with and accounted to the estate for this judgment against appellee, and thereby he became subrogated to the rights of the estate to said judgment. If a representative of an estate pays to the estate an indebtedness due to the estate, he becomes equitably the owner of such asset of the estate. *Sheldon on Subrogation*, § 202; 27 Am. & Eng. Enc. Law, 253. But in this case there is no evidence that appellant paid to the estate of Susan Jones this judgment against appellee or accounted therefor to said estate in his settlements. The only order of the probate court made in the matter of said estate relative to any settlement filed by appellant as said administrator is the order set out above. In that order it is provided that "B. Ward, administrator, be charged \$50 for rent of 1894." There is no charge made against the administrator on account of said judgment, and there is no testimony in the record showing that this judgment against appellee covers the item of \$50 for rent of 1894, or that such

rent was due from appellee, or that the judgment recovered before the justice of the peace was based upon such item of rent. Before one can be subrogated to the rights of another in property, the evidence must show that he is clearly entitled to such right to subrogation. The affirmative allegations in the complaint in this case that the judgment was the property of the estate of Susan Jones were in effect denials of the averments made by appellants in the answer that Ward was the owner thereof by reason of a right of subrogation thereto. Such averments in the answer were matters of defense, and required no reply. They were therefore not admitted, but required proof to sustain them. 18 Enc. Plead. & Prac. 696; *Watson v. Johnson*, 33 Ark. 737; *George v. St. Louis, I. M. & S. Ry. Co.*, 34 Ark. 613; *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 44 Ark. 293. There is no testimony in the record which shows that appellant paid to the estate the indebtedness due to it by appellee or accounted to the estate for the judgment which the estate recovered against him. The chancellor therefore erred in finding that appellant Ward was entitled to be subrogated to the rights of the estate of Susan Jones in the judgment which was recovered against appellee. The judgment was therefore a part of the assets of the estate of Susan Jones when the administration of that estate was closed, and thereupon the heirs of Susan Jones became the owners thereof, and they were and are the only persons who had a right to control and enforce it. But the right to enforce the judgment could not be lost by laches or any delay shorter than the period provided by the statute of limitation as a bar against judgments. The doctrine of laches applies only to equitable defenses interposed against the enforcement of equitable rights or remedies; it does not bar the enforcement of a strict legal right, which alone is involved in the enforcement of a judgment at law. *Waits v. Moore*, 89 Ark. 23.

It follows that the heirs of Susan Jones had and have the right to enforce this judgment against the appellee, but the appellant, under the testimony in the record in this case, did not have that right.

Upon the whole case, therefore, the decree of the chancellor is correct, and it is affirmed.

KIRBY, J., not participating.

MEMPHIS ASPHALT & PAVING COMPANY v. FLEMING.

Opinion delivered November 7, 1910.

1. NEGLIGENCE—INDEPENDENT CONTRACTOR—LIABILITY AFTER ACCEPTANCE OF WORK.—The general rule is that, after a contractor has turned work over to the proprietor, he incurs no liability to third persons by reason of the condition of the work, and the responsibility for its subsequent maintenance is shifted to the proprietor. (Page 443.)
2. SAME—INDEPENDENT CONTRACTOR—SUFFICIENCY OF ACCEPTANCE OF WORK.—The rule that the liability of a contractor ceases when he turns over the work to the proprietor does not require formal acceptance; the liability of the contractor ceases with the practical acceptance after completion of the work. (Page 444.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; reversed.

J. H. Harrod and *Harry H. Myers*, for appellant.

It was for the city authorities to say whether or not a guard rail should be erected. No charge of negligence can be maintained unless it can be shown that there has been some neglect of duty. The contract does not call for the erection of a guard rail nor maintenance of lights, and the proof is absolute that appellant had complied with every specification of the contract in the building of the sidewalk. Moreover, it had been completed and accepted by the city by opening up the sidewalk to public use before the accident occurred. Appellant's request for peremptory instruction should have been granted.

Bradshaw, Rhoton & Helm, for appellee.

The fact that the city would not be liable does not absolve appellant, while it was in possession and had charge of the street, from the necessity of exercising such care as was necessary to prevent persons rightfully using the street in the use of ordinary care from being injured. The sidewalk at this point was manifestly dangerous; appellant was in possession; should have erected guard rails and maintained lights to warn pedestrians of the danger, and, failing therein, is liable.

KIRBY, J. In this suit the plaintiff recovered judgment below for \$783 damages for personal injury caused by stepping or falling off the north edge of the sidewalk into the town branch in the alley on West Fourth Street, between Center and

Louisiana streets in the city of Little Rock, on the night of September 5, 1909.

This sidewalk was constructed by the Memphis Asphalt & Paving Company along the north side of West Fourth Street, across said alley, over the branch therein, which was about five and a half feet deep and twelve feet wide, its north edge being the property line, under its contract with an improvement district of said city under the supervision of the district's engineer and in accordance with the plans and specifications furnished by the engineer of the city. There was no guard rail or barrier erected along the north edge of the sidewalk where it extended over said branch, nor was any provided for in nor required by the contract for the protection of persons using the walk; neither was there any light placed thereon to warn persons of the danger at the time of the injury. The negligence complained of was appellant's failure to place guard rails or barriers to protect or lights to warn against the danger. Defendant denied any negligence, and contended it had paved the street and constructed the sidewalk in accordance with the contract, and that the work was completed and accepted before the injury occurred.

In our view of the case it is not necessary to point out the errors committed by the trial court in giving or refusing instructions on the question of negligence, for, without regard to that, there does not appear to be any liability upon the part of defendant. The proof shows that the street had been paved and the sidewalk constructed in accordance with the contract plans and specifications, and that it had been in fact and formally accepted by the engineer in charge of the district on September 2, and thrown open to the use of the public, and that plaintiff's injury occurred three days thereafter, and that later the city accepted the improvement of the entire district on October 6 or 7, without any change in the work on this sidewalk. The asphalt company's contract was with the improvement district, not the city.

The general rule is that after the contractor has turned the work over and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work, but the responsibility, if any, for maintaining or using it in its defective condition is shifted to the

proprietor. Thompson on Negligence, 686, and cases cited; *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 26 L. R. A. 504; *Daugherty v. Herzog*, 145 Ind. 255, 32 L. R. A. 837; *Salliotte v. King Bridge Company*, 58 C. C. A. 469.

It would not come within the qualifications to the rule that the work was a nuisance *per se*, or was turned over by the contractor in a manner so negligently defective as to be eminently dangerous to third persons.

"The rule in this connection does not require a formal acceptance of the contractor's work. The liability of the contractor will cease with a practical acceptance after completion of the work." *Read v. East Providence Fire District*, 20 R. I. 574, 40 Atl. 760.

The sidewalk improvement having been completed, and the undisputed evidence showing it to have been accepted by the engineer of the district and in fact opened to the use of the public before plaintiff's accident and injury, no useful purpose could be served by sending this case back to the trial court, and it is reversed and dismissed.

HAMMONS v. PENDLETON.

Opinion delivered November 14, 1910.

EXECUTIONS—FAILURE TO RETURN—PENALTY.—An officer is not liable for the statutory penalty for failure to return an execution within sixty days where plaintiff's attorney directed him to do nothing further with the writ until he could see about making a compromise.

Appeal from Union Circuit Court; *George W. Hays*, Judge; affirmed.

R. L. Floyd, for appellant.

The sheriff was never instructed not to return the execution, and the rule announced in 74 Ark. 413, does not apply. The instruction given by one of plaintiff's attorneys not to advertise and sell the property does not excuse the failure to make return. 35 Cyc. 1725, par. 22; 47 Ark. 373; 22 Ark. 524.

Powell & Taylor, for appellee.

Where the failure to fully perform his statutory duty by the sheriff is due to the conduct or instructions of the plaintiff in execution or his attorney of record, the sheriff is not liable. The execution is under the control of the plaintiff and his attorney, and the officer must follow instructions. 24 N. J. L. 542; 84 Ill. App. 132; 63 Ind. 428; 2 Swan (Tenn.), 82; 7 Humph. (Tenn.), 189; 7 Heisk. (Tenn.), 579; 25 Am. & Eng. Enc. of Law (2 ed.), 692; *Id.* 466; Murfree on Sheriffs, par. 969, 969a; 41 N. W. 1097; 50 Ill. 58; 77 N. Y. 466; 74 Ark. 413.

McCULLOCH, C. J. Appellant's intestate, F. A. Hammons, moved for a summary judgment in the circuit court of Union County against W. G. Pendleton, former sheriff, for failure to return an execution issued against one Edwards. The circuit court refused to give judgment as prayed, and an appeal has been taken to this court.

The motion was heard upon oral testimony, and the court found therefrom that the failure to return the execution was caused by the instructions and advice of the attorney of the creditor. Appellee testified that, after the execution came to his hands as sheriff, the attorney for plaintiff instructed him to do nothing with it until he (the attorney) could see about making a compromise with the debtor; that nothing further was said to him about the execution until this proceeding for summary judgment against him was instituted. The attorney for plaintiff testified in substance the same. The evidence was sufficient, therefore, to sustain the findings of the court.

In *Bickham v. Kosminsky*, 74 Ark. 413, which was also a suit to recover for failing to return an execution, we said: "The plaintiff in execution has a right to control the execution by himself or attorney, and, having such right, the officer must follow his instructions. * * * This authority of the plaintiff must not be exercised to cause the sheriff to omit a statutory duty; but if it does cause him to do it, the plaintiff can not take advantage of it."

It is true, there was no specific instruction to appellee not to return the execution, and, as said by this court in *Jett v. Shinn*, 47 Ark. 373, "the sheriff is not excused from returning an execution by any conduct of the plaintiff which falls short

of showing that the nonreturn resulted from the act or instructions of the plaintiff, or was ratified or waived by him." We think the evidence was sufficient to warrant the court in finding, however, that the sheriff was instructed by the attorney to take no further steps at all under the execution, even to return it. At the time the instructions were given, the sheriff suggested that, as his term of office was approaching a close, the execution should be renewed, and it was then that the attorney instructed him to do nothing with it until he could see about making a compromise. Under those circumstances, we think the sheriff was warranted in holding the execution under the belief that the plaintiff would take no advantage of his failing to discharge his duty in serving or returning the writ. In fact, under those circumstances, he had no duty at all to discharge save to follow the advice of the attorney and hold the writ for further orders.

The Supreme Court of Mississippi, in a similar case, used the following language, which we think is peculiarly applicable to this case: "While the officer was not told in so many words that he might hold up the writ, he did receive instructions from which he was fairly led to infer a willingness upon the part of the plaintiff's attorneys for him to do so. Those who propose to invoke against officers the severe penalties of the statute upon which this motion is based must be careful to do nothing which directly or indirectly contributes to the omission of duty complained of." *Simms v. Quinn*, 58 Miss. 221.

The judgment is affirmed.

ROCK ISLAND PLOW COMPANY v. MASTERSON.

Opinion delivered November 14, 1910.

1. LIMITATION OF ACTIONS—LAW OF THE FORUM.—All suits must be brought within the period prescribed by the local law of the State in which the action is instituted. (Page 448.)
2. SAME—WHEN CAUSE OF ACTION ACCRUES.—A cause of action ordinarily accrues when the liability of the defendant becomes complete, which in the case of a note is at its maturity. (Page 448.)

3. **SAME—ABSENCE OR NONRESIDENCE OF PARTY AS AFFECTING.**—Unless the statute of limitations makes an exception, its operation will not be suspended during the absence from the State or nonresidence of either a creditor or a debtor. (Page 448.)
4. **SAME—ABSCONDING.**—One who leaves a State openly and publicly and with the knowledge of his creditor is not an absconding debtor, within Kirby's Digest, § 5077. (Page 450.)

Appeal from Clay Circuit Court, Western District; *Frank Smith*, Judge; affirmed.

J. N. Moore, for appellant.

The action was not barred. The statute of the forum does not begin to run until the defendant comes within the jurisdiction in which the suit is brought. The time elapsing between the accrual of the right of action in the foreign State and the acquiring of residence in the State where suit is brought forms no part of the statutory period. 2 Vern. 540; 13 East 439; 126 Ala. 616; 28 So. 620; 4 Conn. 47; 24 Conn. 432; 3 Kan. 26; 9 S. W. 507; 55 Me. 230; 12 Neb. 471; 11 N. W. 729; 3 Johns. Ch. 190; *Id.* 263; 12 Okla. 33; 13 S. E. 355; 15 S. Dak. 98; 5 Am. & Eng. Ann. Cas. 542.

G. B. Oliver, for appellee.

Not only are the acts of limitations in this State made by statute to apply to nonresidents as well as residents, but it is also the rule that the law of the forum governs the statute of limitations. Kirby's Digest, § § 5069, 5076, 5077, 5088; 83 Ark. 495; 67 Ark. 189, 56 Ark. 187; 47 Ark. 170; 63 Ark. 244.

FRAUENTHAL, J. This is an action instituted by the appellant upon a note, and the appellee pleaded the statute of limitation as a bar to a recovery thereon. The note was executed in the State of Illinois on April 15, 1902, and was payable on September 20, 1902. At the date of its execution the appellant was a corporation domiciled in, and the appellee was a resident of, said State. The appellee moved to the State of Arkansas in 1905, and has resided in this State since that time. This suit was commenced more than five years after the maturity of said note, but within five years since appellee moved to and became a resident of this State. The lower court adjudged that the action was barred.

It is the well-settled rule that all suits must be brought within the period prescribed by the local law of the State in which the action is instituted. Personal contracts are interpreted by the law of the place where they are made, but the remedies for their enforcement are regulated by the law of the forum in which the suit is brought. The statute of limitation fixes the time within which the remedy must be pursued, and therefore applies to the remedy for a breach of a contract. The statute of limitation of the State in which the action is instituted determines whether or not it is barred. Wood on Limitations, § 8; Angell on Limitation, § 65; *Blackburn v. Morton*, 18 Ark. 384; *Carter v. Adamson*, 21 Ark. 287; *Townsend v. Jemison*, 9 How. 407.

It is provided by section 5069 of Kirby's Digest that: "Actions on promissory notes and other instruments of writing not under seal shall be commenced within five years after the cause of action shall accrue, and not afterwards." It is urged by appellant that the accrual of the cause of action is not determined alone by the maturity of the note, but that the cause of action does not accrue, and the statute of limitations of the forum does not begin to run, until the defendant comes within the jurisdiction of the State in which the suit is brought. The soundness of this contention must be determined solely by the statute of limitation of this State. The cause of action ordinarily accrues whenever the liability of the defendant becomes complete, and in actions founded upon a note the cause of action thereon accrues at the maturity of such note.

Unless the statute makes exception, the operation of the statute of limitation will not be suspended during the absence from the State of either the creditor or debtor, nor will it be postponed because the debtor is absent from, or a non-resident of, the State at the time of the accrual of the action. The courts can not make an exception if none is expressly named in the statute. In the case of *State Bank v. Morris*, 13 Ark. 291, this court said: "The statute which created the limitation must also create the exception. We know of no rule of law or decision to the contrary." *Clarke v. Bank of Mississippi*, 10 Ark. 516; *Pryor v. Ryburn*, 16 Ark. 671; *Machin v. Thompson*, 17 Ark. 199.

In England, by the act of 4 and 5 Anne, it was provided that if the person against whom the action is brought shall be at the accrual thereof beyond the seas, the action may be brought against him after his return within the period fixed by the statute of limitation. Following this enactment, a similar provision has been incorporated in the statutes of many of the States postponing the operation of the statute of limitation until the return of the defendant to the jurisdiction of the forum in cases wherein the defendant was absent from such jurisdiction at the time of the accrual of such action. And in the early enactment of the statute of limitation in this State this exception was incorporated therein. By section 20 of chapter 91 of the Revised Statutes it was provided: "If, at the time when any cause of action specified in this act accrues against any person, he be out of the State, such action may be commenced within the times herein respectively limited after the return of such person into the State; and if after such cause of action shall have accrued such person depart from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time herein limited for the commencement of such action." In like manner there was a provision postponing the operation of the statute in event the creditor was absent from the State at the time of the accrual of the cause of action. By the act of December 4, 1844 (Acts 1844, p. 25), these exceptions in the statute of limitation were expressly repealed. By said act it was further provided that: "This act and all other acts of limitation in force shall apply to nonresidents as well as residents of the State." Kirby's Digest, § 5076.

It then made the following provision for postponing the operation of the statute in cases where the debtor was a non-resident of the State at the time of the accrual of the action:

"If any debtor or debtors shall fraudulently abscond from any other State, territory or district to this State, without the knowledge of his, her or their creditor or creditors, such creditor or creditors may commence suit against such absconding debtor or debtors within the time of this act, or any other acts of limitations now in force, prescribed for limiting such action or actions, after such creditor or creditors may become

apprised of such residence of such absconding debtor or debtors." Kirby's Digest, § 5077.

And in cases where a resident of the State was absent from the State at the time of the accrual of the cause of action it made the following provision for the suspension of the operation of the statute: "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented." Kirby's Digest, § 5088; *Richardson v. Cogswell*, 47 Ark. 170.

By the repeal of said section 20, chapter 91, Revised Statutes, which provided for the postponement of the running of the statute in case where the defendant was absent from the State at the time of the accrual of the cause of action, we think that it was the intention of the Legislature to provide for the running of the statute from the time when the cause of action accrued, whether the same accrued in this State or another State, and whether it accrued against a resident or nonresident; and that the only exceptions from the operation of the statute are the cases falling within the above provisions of sections 5077 and 5088 of Kirby's Digest.

In construing section 5077 of Kirby's Digest, this court held in the case of *Keith v. Hiner*, 63 Ark. 244, that the debtor must fraudulently abscond from the foreign State in the manner indicated in said section before the creditor would be entitled to invoke the exception to the running of the statute provided therein. And the court in that case said: "If the debtor leaves openly, publicly or with the knowledge of the creditor, the creditor has the opportunity of tracing or following him to his destination, or suing him before he changes his domicile."

It is conceded that the appellee left the State of Illinois openly and publicly and with the knowledge of appellant, and that the facts of this case do not bring it within the provisions of section 5077 of Kirby's Digest. There is no provision of our statute which postpones the running of the statute of limitation simply because either of the parties or both were non-residents of or absent from the State at the time the right

to bring the action became complete and perfect, and thus accrued. In States in which some such provision is incorporated in their statutes of limitation it has been held that the statute does not begin to run until such nonresident debtor comes within the jurisdiction of the forum. But in those States having statutes with no such exception it has been uniformly held that the statute begins to run from the maturity of the debt in the foreign State. See *Rutledge v. United States Savings & Loan Co.*, 5 A. & E. Ann. Cas. 542, and note thereto; *Thomas v. Black*, 22 Mo. 331; *Snoddy v. Cage*, 5 Texas 106; *Moore v. Carroll*, 54 Ga. 126. We therefore conclude that the operation of the statute of limitation was not postponed until the time when the appellee came within this State, but that it ran from the time the right of action upon the note became complete by its maturity; and, more than five years having elapsed since said date and before the commencement of this suit, it follows that the action was completely barred.

The judgment is affirmed.

DOSS v. LONG PRAIRIE LEVEE DISTRICT.

Opinion delivered November 14, 1910.

1. AGENCY—EFFECT OF AGENT'S FRAUD.—Where an agent is guilty of fraud upon his principal in the transaction of his agency, and his principal is put to trouble and expense of litigation in order to secure his rights, the agent forfeits his right to compensation for his services as a penalty for his fraudulent conduct. (Page 454.)
2. JUDGMENT—CONCLUSIVENESS.—A judgment is conclusive only between the parties and their privies. (Page 454.)
3. SAME—CONCLUSIVENESS AGAINST STRANGER.—The fact that a principal recovered judgment for damages against one who was alleged to have conspired with his agent to defraud such principal is not evidence of such conspiracy against the agent or his privies. (Page 454.)
4. TRIAL—DIRECTING VERDICT.—It is error to direct a verdict where there is a substantial conflict of testimony upon the issue involved in the case. (Page 455.)

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; reversed.

Cockroft, Odle & Covern and Warren & Smith, for appellant.

1. A judgment upon the merits of a controversy is binding upon all parties and privies, and is a complete bar to any new action, suit, defense, setoff or counterclaim involving the same matter. 24 Am. & Eng. Enc. of Law, (2 ed.), 710; 19 Enc. Pl. & Pr. 736.

2. Appellee's defense is barred by the former recovery. 24 Am. & Eng. Enc. of Law (2 ed.), Tit. *Res Judicata*; 85 Md. 8.

3. In an action *ex contractu*, defendant can not counterclaim or setoff unliquidated damages flowing from a tort. 27 Ark. 489; 1 Ark. 338; 12 Ark. 651; 48 Ark. 396; 55 Ark. 312; 9 Ind. 470; 53 Ind. 216; Pomeroy's Remedies & Rem. Rights, § 784; Kirby's Digest, § 6099. An unliquidated claim, whether arising out of contract or sounding in tort, can not be used as a setoff. Kirby's Digest, § 6101; 30 Ark. 50; 54 Ark. 187; 4 Ark. 527; 27 Ark. 489; 16 Ark. 97; 25 Am. & Eng. Enc. of Law (2 ed.), 501.

4. Before the matter set up in the answer could be a good defense against appellant, it must be a valid and enforceable counterclaim against LeVasseur, were he the plaintiff. Pomeroy's Rem. & Rem. Rights, § § 741, 752.

Henry Moore, Jr., for appellee.

1. The counterclaim and setoff of appellee arises out of the contract set out in the complaint, is connected with the subject-matter of the action, and falls within the exceptions mentioned in the statute. Kirby's Digest, § 6099. As to the meaning and intent of this statute, see 60 Ark. 387; 64 Ark. 224; 71 Ark. 414.

2. Appellant took the certificate subject to all defenses which the appellee had against LeVasseur; and he, after perpetrating the fraud practiced by him in the course of his employment, could not recover.

Cockroft, Odle & Covern and Warren & Smith, in reply.

The court erred in directing a verdict. There was conflicting evidence which should have been submitted to the jury. 77 Ark. 556; 71 Ark. 305; 63 Ark. 94; 62 Ark. 63; 61 Ark. 442; 39 Ark. 413; 36 Ark. 451; 35 Ark. 147; 33 Ark. 350.

HART, J. This was an action brought by appellant against appellees to recover the sum of \$700 alleged to be due upon a certificate of indebtedness issued to Charles LeVasseur for services while in the employment of appellees, and by him transferred to appellant.

Appellees answered, admitting the employment of LeVasseur, and the issuance of the certificate of indebtedness to him for his services; but they alleged facts which showed that LeVasseur was guilty of fraud in the transaction of his agency, and that the certificate was issued before his fraudulent acts became known to appellees. The facts, so far as they are material to a determination of the issues raised, are as follows:

The board of directors of the Long Prairie Levee District entered into a contract with the Tally-Bates Construction Company, of Memphis, Tennessee, to construct a levee in Lafayette County, Arkansas. The board employed Charles LeVasseur as its chief engineer, and it became his duty as such engineer to superintend the construction of the levee generally, to make estimates of the amount of work done, to see that it was built according to the plans and specifications provided in the contract, and, in general, to perform such duties as are usually performed by chief engineers in the construction of levees.

Appellees adduced evidence tending to show that LeVasseur, during the term of his employment by them, was in collusion with the Tally-Bates Construction Company, and conspired with it to defraud appellees; that LeVasseur was, during the term of his employment by them, also in the service of the Tally-Bates Construction Company without their knowledge or consent; that during such period he returned false and fraudulent estimates of the work done by said construction company largely in excess of what was actually done by it, and that he was guilty of other frauds in the conduct of his agency; that, as a result of his dishonesty, appellees were compelled to institute suit against the Tally-Bates Construction Company to recover the amounts lost by them on account of his fraudulent conduct and collusion with said construction company; that they recovered judgment in their said suit against the Tally-Bates Construction Company, but that they were com-

pelled to expend the sum of \$600 for attorney's fees for the prosecution of the suit.

LeVasseur was a witness for appellant, and denied that he had been guilty of any fraud whatever in the discharge of his duties of chief engineer while in the employment of appellees; and stated that he had discharged his duties in an efficient manner, and was in every way faithful to the interest of his employers.

The trial court directed the jury to return a verdict for appellees, and the case is here on appeal.

Did the court err in directing the verdict?

The rule is well settled, both by the text-writers and the adjudicated cases, that where the agent is guilty of fraud, dishonesty or unfaithfulness in the transaction of his agency, such conduct is a bar to the recovery by him of wages or compensation. 31 Cyc., p. 1498, and cases cited in note 5; 1 Clark & Skyles on the Law of Agency, p. 819; Story on Agency, § § 333 & 334; Mechem on Agency, § § 643, 798; Tiffany on Agency, p. 418.

So, we hold the law to be that where the agent is guilty of fraud upon his principal in the transaction of his agency, and his principal is put to trouble and expense of litigation in order to secure his rights, the agent forfeits his right to compensation for his services as a penalty for his fraudulent conduct.

It is not claimed by appellant that she acquired any greater rights by the transfer than LeVasseur had before; but she insists that the court erred in taking from the jury the question of LeVasseur's honesty and faithfulness in the discharge of the duties of his agency; and in this we think appellant is right.

It is well-settled that a judgment or decree is conclusive only between the parties or their privies. *Avera v. Rice*, 64 Ark. 330; *Treadwell v. Pitts*, 64 Ark. 447; *Spaulding Mfg. Co. v. Chaudoin*, 87 Ark. 418; Crawford's Digest, vol. 1, p. 523 and 524.

"It sometimes happens that a third person and an agent conspire to practice a fraud upon the principal, and in such a case the principal may maintain an action against either

or both to recover damages for the conspiracy and fraud. And the fact that the principal has brought an action and recovered against the agent for his fraud as agent does not prevent a subsequent recovery against the third person for his fraud, because these are separate causes of action." 2 Clark & Skyles, Agency, pp. 1197 and 1198.

"In such case the agent has been guilty of two distinct and independent frauds—the one in his character of agent, the other by reason of his conspiracy with the third person with whom he had been dealing." *Ib.*, 1199.

It follows that, under the facts as shown by appellees, they had a right to proceed against either the Tally-Bates Construction Company, or LeVasseur, or both. They elected to sue the former. The latter was not made a party to the suit. He had no legal right to control the proceedings, or to make a defense to the action, or to prosecute an appeal from the decree. He was a stranger to that suit, and is not concluded by the judgment rendered therein.

A judgment is evidence of nothing, in a subsequent action between different parties, except that it had been rendered. *Thomas v. Hinkle*, 35 Ark. 450.

It follows that the decree in the case of appellees against the Tally-Bates Construction Company is not evidence of the facts upon which the decree was founded; that is to say, the decree in that case is no evidence to show that the damages which appellees sustained was caused by the fraud and misconduct of LeVasseur. In short, the fact that appellees, in a suit against the Tally-Bates Construction Company alone, recovered damages for alleged fraud and collusion practiced upon them by said construction company and LeVasseur is no evidence that LeVasseur was guilty of such fraudulent conduct. That was a fact to be proved by other evidence. Of course, appellees had a right to adduce the same evidence heard at that trial, if it was competent. *Avera v. Rice*, *supra*.

LeVasseur testified that he had been guilty of no wrongful conduct affecting the rights of appellees while he was employed by them. This presented a conflict in the testimony which appellant had a right to have submitted to the jury; and the court erred in directing a verdict for appellees.

Other errors in the admission of testimony are pressed upon us as grounds for a reversal of the judgment; but, in view of the principles of law announced, we do not think they will be likely to again arise on a retrial of the case; and we will not discuss them.

For the error in directing a verdict for appellees, the judgment will be reversed, and the cause remanded for a new trial.

BROWN v. BROWN.

Opinion delivered November 14, 1910.

1. MORTGAGES—TRANSFER—VALIDITY.—One who by transfer takes a note and mortgage before maturity in good faith and for value, without notice that the consideration of the note and mortgage had failed or that it had never been delivered to the mortgagee, acquires a good title. (Page 460.)
2. AGENCY—APPARENT AUTHORITY.—A principal is bound by all that is done by his agent within the scope of his apparent power, and cannot avoid the consequences of his acts because no authority was in fact given to him to do them, unless they were in excess of the agent's apparent authority or were done under such circumstances as put the person dealing with him upon notice or inquiry as to his real authority. (Page 460.)
3. SAME—APPARENT AUTHORITY.—One who represented defendant in making a contract for the payment of a note secured as provided in the contract, and who retained this contract and other papers belonging to her had apparent authority to substitute a mortgage executed by defendant in lieu of stock attached to the contract as collateral security. (Page 460.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

Downie, Rouse & Streepey and *Carmichael, Brooks & Powers*, for appellant.

The decree foreclosing the mortgage against the homestead was erroneous. Mandelbaum in dealing with Stevenson was bound to inquire into the nature and extent of his authority. 62 Ark. 33; 19 Am. Dec. 94. Moreover, he was put on notice by Stevenson's own statement that he, Mandelbaum,

was not surrendering the shares of stock for the benefit of appellant. Steele on Agency, § 82; 53 Ark. 135; 79 Ark. 401. Appellee is not in the position of an innocent purchaser without notice, because Mandelbaum, her agent, it is clearly shown, acted with notice that there was no consideration passing to appellant. He could not be a *bona fide* holder of the note and mortgage because they were not taken in the due course of trade or of business. He acquired no better title than Dickinson or Stevenson, who had none. 47 Ark. 363; 3 Am. St. Rep. 205; 16 *Id.* 661; 48 *Id.* 400. An equitable lien could not be created upon the homestead merely by the deposit of the mortgage. 3 Pomeroy (3 ed.), § 1265.

Riddick & Dobyms, for appellee.

1. Neither appellee nor his agent had ever been notified of the termination of Stevenson's agency, and they were justified in the belief that he was still appellant's agent with power to act in the substitution of the collateral. 31 Cyc. 1639, 1640; 24 Pa. Sup. Ct. 396. And the evidence shows that she ratified his act.

2. Appellant is estopped to deny the validity of the note and mortgage in the hands of appellee. 42 Ark. 24; 7 Cyc. 799; 11 Ark. 285; 33 N. J. Eq. 338; 63 N. J. Eq. 549, 53 Atl. 139; 63 N. E. 751; 86 Pa. 80; 1 Parson, Eq. Rep. 248; 60 N. E. 983. There is no allegation nor proof of bad faith on the part of Mandelbaum in the purchase of the note, and the burden of proving that it was not taken in good faith was on the appellant. 1 Daniel, Neg. Inst., § 776; 2 Wall. 110; Tiedeman on Commercial Paper, § 289; 61 Ark. 81. Mere knowledge of facts that would raise a suspicion as to the validity of the paper or gross negligence on the part of the taker at the time of the transfer is not sufficient to impair the buyer's title. 30 S. W. 1077; 96 U. S. 58. Purchaser of negotiable paper is not bound to make inquiry, though dealing with an agent. 1 Daniel, Neg. Inst., § § 771-775. The fact that no consideration moved to the principal does not defeat estoppel. 102 Ill. 84-86. See also 105 Mo. App. 384; 79 S. W. 1013; 16 Cyc. 728.

HART, J. Lillian G. Brown purchased a stock of goods from Belle Brown in the city of Little Rock, Arkansas, and

for part of the purchase money executed the following instrument of writing:

"Little Rock, Ark., June 22, 1908.

"One month after date, for value received, I promise to pay to Mrs. Belle Brown the sum of \$50 or more, and on each and every succeeding month thereafter the sum of \$50 or more, until the full consideration for which this note is given, \$4,600, with interest from date at the rate of 8 per cent. per annum, is paid in full; payable without defalcation or discount. The maker and indorser of this note severally waive notice of nonpayment and protest. This note being for the balance of the purchase of a stock of goods, it is hereby agreed and understood that a lien shall be retained on the south 47 feet of lot 2, block 37, in the town of Argenta, Arkansas, and subject to a mortgage now held on same by the Ladies' Building & Loan Association of Little Rock, Arkansas, said property being of the value of \$2,500; that this note shall be indorsed and guaranteed by R. E. Stevenson; that, for additional security for the payment of said balance, stock certificate No. 10, for eighty (80) shares of stock of the Rose City Bank, of the city of Little Rock, Arkansas, is hereby attached hereto as collateral, said stock being worth \$2,000. It is further agreed that at any time the parties hereto shall see fit to change the amount or kind of security, collateral or otherwise, provided for herein, it may be done with the consent of the parties hereto.

"Lillian G. Brown.

"Indorsed by R. E. Stevenson."

In the transaction, R. E. Stevenson acted as agent for Lillian G. Brown and J. J. Mandelbaum as agent for Belle Brown. Both principals and agents were present when the contract was executed. Some time afterwards Stevenson stated to Mandelbaum that he wanted the 80 shares of stock in the Rose City Bank for the purpose of giving the same to his wife. After some discussion it was agreed that the stock should be delivered to Stevenson, and in lieu of it he delivered to Mandelbaum an unrecorded mortgage on the homestead of Lillian G. Brown. This mortgage purports to have been executed on June 28, 1908 by Lillian G. Brown to W. L. Dickinson, agent, to secure the sum of \$1,000 and interest, which the mortgage recites was due by

Lillian G. Brown to said W. L. Dickinson, agent, on or before two years after date of mortgage. There was an assignment of said mortgage and the note for \$1,000, which it was given to secure, by said Dickinson to said Belle Brown. This assignment or transfer of the mortgage is dated August 15, 1908.

Mandelbaum testified that he understood that the mortgage of Lillian G. Brown to W. L. Dickinson, agent, was a good and binding obligation at the time he accepted the transfer of the same in lieu of the Rose City Bank stock.

Lillian G. Brown testified that the mortgage from her to said Dickinson was executed for the purpose of borrowing money to pay on her homestead; that the contract with Dickinson was never consummated, and that she received no money from him; that she left the mortgage with Stevenson for the purpose of obtaining the money, and that the "deal fell through," and that the mortgage was never delivered to him; that she neglected to take back the mortgage from the custody of Stevenson; that she did not know that it had been assigned or transferred to Belle Brown until this suit was instituted; that she gave Stevenson no specific authority to make such transfer. When she was asked whether or not she authorized Stevenson to transfer said note and mortgage to Belle Brown, she replied that she did not; and further said: "I didn't know at the time anything about it, but he acted as my agent, and I supposed he thought it was all right." She admitted, however, that Stevenson represented her in the original transaction, and continued to represent her in regard to it; that the contract in question and her papers generally were intrusted to him.

This suit was instituted by Belle Brown against Lillian G. Brown to foreclose this mortgage; and also to foreclose the liens on the other property described in the above agreement or instrument of writing, dated June 22, 1908.

The decree of the chancery court was in favor of the plaintiff. It is not necessary to abstract the evidence in regard to the Argenta lots, for the reason that no complaint is made that the decree is erroneous in that respect.

The only contention is that the court erred in decreeing a foreclosure of the mortgage from Lillian G. Brown to W. L. Dickinson, agent, which was transferred to Belle Brown.

It is first contended by Lillian G. Brown that this mortgage had never been delivered by her to Dickinson, and the consideration for which it was executed had failed. This fact can not affect the rights of Belle Brown; for the mortgage and transfer of the same on their face appeared to be valid instruments. The transfer was made before maturity, and the undisputed evidence shows that neither Belle Brown nor her agent had any knowledge that the consideration for the mortgage had failed or that it had never in fact been delivered to Dickinson at the time it was accepted as security in lieu of the Rose City Bank stock.

It is next contended by counsel for Lillian G. Brown that Stevenson had no authority to make the change or substitution of securities. While Lillian G. Brown and Stevenson both testified that the latter did not have the specific authority to make any changes in the security of the original contract, their evidence shows that Stevenson not only represented her in making the original contract, but that such agency continued after the contract was executed. She admits that this contract and her papers in general were intrusted to his care. The contract itself provided for a change in the amount and kind of securities.

"The rule is, a principal is bound by all that is done by his agent within the scope of his apparent power, and can not avoid the consequences of his acts because no authority was in fact given him to do them, unless they were in excess of the agent's apparent authority, or were done under such circumstances as put the person dealing with him upon notice or inquiry as to his real authority." *Jacoway v. Insurance Company*, 49 Ark. 320.

"Every delegation of authority, whether it be general or special, express or implied, unless its extent be otherwise expressly limited by the same instrument conferring it, carries with it, as an incident, the power to do all those things which are necessary, proper, usual and reasonable to be done in order to effectuate the purpose for which it was created." Mechem on the Law of Agency, § 311. To the same effect, see Tiffany on Agency, p. 174 and 184; 1 Clark & Skyles, Agency, pp. 504 and 526.

Under the facts detailed above, it certainly was within the scope of Stevenson's apparent, if not real, authority to make

a change in the securities, and the fact that Stevenson used the released bank stock for his own purpose could not affect the rights of Belle Brown unless she had notice of the limitations upon Stevenson's authority.

The decree will be affirmed.

DARLING v. BURNETT.

Opinion delivered November 14, 1910.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where a master promulgates a rule for the safety of his servants, and a servant is injured while in violation of the rule, and on account of such violation, the court will declare him, as a matter of law, guilty of contributory negligence. (Page 464.)
2. SAME—DUTY OF SERVANT TO OBEY MASTER.—An instruction to the effect that if a servant violated his master's instructions and was injured he could not recover damages therefor from the master was correct and should not have been modified by adding the further qualification that the servant could not recover if he violated the master's instructions "with full appreciation of the danger." (Page 464.)

Appeal from Nevada Circuit Court; *Jacob M. Carter*, Judge; reversed.

STATEMENT BY THE COURT.

Horatio Burnett, a minor, by his father and next friend, John C. Burnett, brought this suit against H. H. Darling and C. P. Darling, partners under their firm name of Darling Brothers, to recover damages for injuries sustained by him while employed at the sawmill of the defendants.

Evidence was adduced by him to prove the following facts: On the 16th day of March, 1909, he went to the sawmill of the defendants to secure employment. At that time he was 19 years old. He had worked around the mill before that, trucking, stacking and off-bearing lumber. He was employed, and was given the job of running the "bull-wheel," which was a machine used for drawing logs up the chute to the saw. When large logs were being drawn up, it frequently happened that the belt became loose. Burnett says that he had been directed by

C. C. Darling to tighten the belt by holding it down with a pinch bar; and that he did not know the dangers attending the work. While so engaged, he sustained the injuries for which this action was brought. There was no idler on the belt. An idler is a pulley that runs on top of the belt to hold it down. While operating the bull-wheel, Burnett stood on a plank platform, which was about five feet above the ground. He had to go about six feet from this platform to the place where he held the belt down with the pinch bar. He walked on planks and over the line shaft to get there. The shaft was about two feet from the ground.

At the time Burnett was injured he had been engaged in holding down the belt with a pinch bar; and while doing this he stood across the shaft with each foot on a sill. There was a collar on the shaft which was fastened to it with a set-screw. When the log had been pulled up, Burnett started to return to his platform at the bull-wheel. Burnett said:

"I stood on sills when I was using the pinch bar; they were oily; about as oily as anything gets to be; it run out of the boxes onto the sills. I had pulled the log up before I was hurt, and went to come back out there, and the set-screw caught my pants leg right at the bottom at the side of the left foot, and wound my pants' leg up. The pulley kept pulling, and got up as far as it could, and got me down, and the belt commenced slipping, and the pulley stopped."

It is not claimed that the verdict is excessive, and for that reason it is not necessary to abstract the testimony showing the character and extent of Burnett's injuries.

Evidence was adduced by the defendants to prove that they had told Burnett and their other employees not to go in behind the line shaft and hold down the belt; that such action was dangerous and would cause them to get hurt; "that, if the belt would not pull the logs, to stop the mill, cut the belt and replace it so that it would pull the logs."

There was a verdict and judgment for plaintiff in the sum of \$500; and defendants have duly prosecuted an appeal to this court.

McRae & Tompkins and *D. L. McRae*, for appellant.

1. Appellee's own testimony shows that he was apprised of the danger incident to the work and appreciated the same. Where a servant has such knowledge and appreciation, there is no duty resting upon the master to warn and instruct as to such dangers. 124 S. W. 524; 56 Ark. 232-8; 6 L. R. A. 733-5.

2. The court should have given the fourth instruction requested by appellant without modification. 51 Ark. 469; 58 Ark. 206; 48 Ark. 348; 77 Ark. 405; 84 Ark. 377; 85 Ark. 237; 88 Ark. 20; 126 S. W. 1005; *Id.* 322; 1 Labatt, Master & Servant, § 363; 26 Cyc. 1245.

Hamby & Haynie, for appellee.

Both as to patent as well as to latent dangers, it is the master's duty to warn and instruct young and inexperienced employees. Knowledge of the danger does not imply appreciation of the same. 90 Ark. 473. The evidence does not establish that appellee appreciated the danger.

HART, J., (after stating the facts). Counsel for defendants assign as error the action of the court in amending and giving to the jury as amended instruction No. 4 asked by them. The instruction, as amended or modified, is as follows:

"4. You are told that the servant is bound to obey the reasonable commands of the master, and if, while disobeying these commands, he is injured, the master is not liable. So, in this case, if you find from the evidence that the plaintiff had been instructed by the defendants not to go behind the line shaft, or had been told not to hold the belt down with the bar, and that in violation of these instructions, *and with full appreciation of the danger*, he did go behind the shaft and hold the belt with the bar, and that he would not have been injured if he had not done so, your verdict should be for the defendant."

The amendment or modification consisted in inserting the words in italics, to wit: "*and with full appreciation of the danger.*" The instruction should have been given as asked.

The evidence on the part of the defendants tends to show that they had instructed the plaintiff and their other employees not to go in behind the line shaft and hold down the belt; that such action was dangerous.

The undisputed evidence shows that plaintiff was injured while engaged in going behind the shaft and holding down the belt with a pinch bar.

The rule of law is that "where a master promulgates a rule for the safety of his servants, and a servant is injured while in violation of that rule, and on account of the violation thereof, then the court will declare him, as a matter of law, guilty of contributory negligence." *St. Louis, I. M. & S. Ry. Co. v. Dupree*, 84 Ark. 377; *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405. The principle upon which the rule is adopted is that it may be assumed that the master has prescribed such methods of doing his work as experience has shown to be the safest for the servant.

The amendment or modification made to the instruction by the court was erroneous.

In the case of *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, the court said:

"If, however, the servant, by reason of his youth and inexperience, is not aware of, or does not appreciate, the danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers. It would be a breach of duty on the part of the master to expose a servant of this character, even with his consent, to such dangers, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and caution, and to do the work safely with proper care on his part. For a breach of his duty the master is bound to indemnify such servant against the consequences. He can not escape this liability by delegating the duty to instruct or inform to another person. But if such servant receives the information and caution from any source, and accepts the place and undertakes the work, he assumes the risks ordinarily incident thereto, and can not thereafter recover for injuries because the place was not safe. As to such work or place and its dangers, he would then be placed on the footing of an adult and could not, on account of infancy, be relieved of the consequences of such risks." To the same effect, see *Arkadelphia Lumber Co. v. Whitted*, 81 Ark. 247; *Arkadelphia Lumber Co. v. Henderson*, 84 Ark. 382, and cases cited.

The purpose of warning the young and inexperienced servant is to place him in the same position as one of mature years. So it may be said that if such servant has been warned and instructed as to the dangers of doing certain work or working at a certain place, it is certainly true that he has an appreciation of the danger. It can not be said that a servant has been properly warned and instructed in regard to a danger, and yet does not appreciate it; for the very purpose of the warning and instruction is to enable the servant to appreciate a danger, which by reason of his youth and inexperience he would not otherwise appreciate. Therefore, we hold that the court erred in modifying the instruction in question by inserting the words, "and with full appreciation of the danger" after the words, "and that in violation of those instructions."

The same error occurs in the modification of instructions Nos. 5 and 6, asked by the defendants, and given to the jury as modified.

We have examined the instructions given at the request of the plaintiff and find no error in them.

For the error in modifying instructions Nos. 4, 5 and 6, asked by the defendants, the judgment must be reversed, and the cause remanded for a new trial.

WADKINS v. MERCHANTS' BANK OF VANDERVOORT.

Opinion delivered November 14, 1910.

1. JUSTICES OF THE PEACE—APPEALS—TIME.—Under Const. 1874, art. 7, § 42, providing that appeals may be taken from final judgments of justices of the peace to the circuit court under such regulations as are now or may be provided by law, the Legislature may fix the time within which the necessary proceedings must be taken in order to perfect an appeal. (Page 467.)
2. SAME—TIME FOR FILING APPEAL BOND.—Under Kirby's Digest, §§ 4666, 4667, providing that an appeal must be taken from the judgment of a justice of the peace within 30 days after the judgment was rendered, and that to suspend the judgment an appeal bond must be filed within the same time, an appeal bond must be filed with the justice of the peace within 30 days in order to obtain a supersedeas, and cannot be filed thereafter. (Page 467.)

3. EQUITY—JURISDICTION TO ENJOIN EXECUTION OF JUDGMENT AT LAW.—Equity has no jurisdiction to enjoin the execution of a judgment at law, as the law court has complete control over its own process. (Page 468.)

Appeal from Polk Chancery Court; *James D. Shaver*, Chancellor; reversed.

E. J. Lundy and *J. S. Lake*, for appellants.

1. A judgment of a justice of the peace can not be superseded after the expiration of 30 days from the rendition of the judgment. Kirby's Digest, § § 4665, 4666, and 4667.

2. The chancery court was without jurisdiction, the appellee having a full and complete remedy at law. 52 Ark. 445; 34 Ark. 354; *Id.* 291; Kirby's Digest, § 3224; 8 Ark. 52; 58 Ark. 314; 48 Ark. 510; *Id.* 331.

J. I. Allen, for appellee.

FRAUENTHAL, J. This was an action instituted by the appellee in the chancery court to restrain the execution of a judgment recovered before a justice of the peace, pending an appeal from said judgment. In the complaint it was alleged that the judgment was recovered against appellee before the justice of the peace on November 30, 1909, and that on the same day the appellee filed with the justice of the peace an affidavit and prayer for appeal, but did not then file an appeal bond superseding the execution of the judgment. On December 31, 1909, an execution was issued on said judgment, and duly placed in the hands of the constable for service. Thereafter, and at a time more than 30 days after the rendition of the judgment, appellee presented to the justice of the peace an appeal bond with good and sufficient sureties thereon, and in sufficient amount, in order to obtain a supersedeas of said judgment pending said appeal. The justice of the peace refused to file the bond, or to recall the execution, or to stay further proceedings on the judgment. Appellee alleged that he had a meritorious defense to the cause of action upon which the judgment of the justice of the peace was founded, and sought by the present suit to restrain any further action under said execution and judgment.

To this complaint the defendants below interposed a demurrer upon the grounds: (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) because the chancery court had no jurisdiction to grant the relief sought;

and (3) because the plaintiff below had a full and adequate remedy at law. The court overruled this demurrer; and, the defendants refusing to plead further, a decree was entered granting the injunction asked for in the complaint.

It is urged by counsel for appellee that, in order to supersede the execution of a judgment of a justice of the peace pending an appeal, it is not necessary that the appeal bond provided by statute be given within 30 days after the rendition of the judgment appealed from, but that it may be filed and approved at any time after the expiration of such time. By article 7, § 42, of the Constitution it is provided that "appeals may be taken from final judgments of the justices of the peace to the circuit courts under such regulations as are now or may be provided by law." The Legislature has the power to fix the time within which the various proceedings must be had in order to take and perfect an appeal from the judgment of a justice of the peace; and each proceeding must be taken within the time prescribed by the statute. Thus, the affidavit for appeal from a judgment of a justice of the peace must be filed within the time prescribed by the Legislature; and the affidavit and prayer for appeal from the judgment of the probate court must be taken within the time and manner pointed out by the statute.

And likewise, when the statute fixes the time within which an appeal bond must be filed, such provision is mandatory, and it can not be filed thereafter as a matter of right in order to secure a supersedeas of such judgment. 4 Enc. Law & Prac. 847; 2 Enc. Plead & Prac. 16; *Ballard v. Noaks*, 1 Ark. 133; *Brady v. Hamlett*, 33 Ark. 105; *Joyner v. Hall*, 36 Ark. 513. Whether or not the sureties upon such bond, accepted, filed and approved after such time, would be estopped from pleading as a defense to an enforcement of such bond that same was not given within the time prescribed by the statute need not be here determined, because such question is not here involved.

In regard to taking an appeal from the judgment of a justice of the peace, it is provided by section 4666 of Kirby's Digest: "No appeal shall be allowed unless the following requisites shall be complied with: * * *

"Second. The appeal must be taken within 30 days after the judgment was rendered, and not thereafter.

"Third. The appellant, or some person for him, together with one or more securities, to be approved by the justice, must, within the time prescribed in the second clause of this section, enter into an obligation before the justice to the adverse party, in a sum sufficient to secure the payment of such judgment and the costs of the appeal, conditioned that the applicant will prosecute his appeal with due diligence to a decision."

* * * * *

"Sec. 4667. Either party may appeal without giving bond, as required in this act; but such appeal shall not operate as a suspension of the proceedings upon the judgment appealed from, and no certificate shall be given the appellant stating that an appeal in the cause has been allowed, and no execution issued be recalled."

Under these statutory provisions an appeal bond must be filed with the justice of the peace within 30 days after the judgment was rendered in order to obtain a supersedeas staying the execution of such judgment, and can not be filed at any time thereafter with such justice.

But the chancery court did not in any event, under the allegations of the complaint, have jurisdiction to enjoin the execution of said judgment. There is no special element of equity jurisdiction set out in the complaint to justify the interference of the chancery court with the execution of the judgment. The justice of the peace has complete control over all process issued by him, and can recall same if it was improvidently issued, or if, after being rightfully issued, it should under the law be recalled. *Anthony v. Shannon*, 8 Ark. 52; *King v. Clay*, 34 Ark. 291; *Scanland v. Mixer*, 34 Ark. 354; *Atkins v. Swope*, 38 Ark. 528. And, if the justice of the peace should refuse to recall such process or execution when under the law it should be done, then, as is said in the case of *Scanland v. Mixer, supra*, "the circuit court by its general supervisory power may on proper application bring up the proceedings by certiorari and grant relief."

The appellee, if he had been entitled to relief, had a plain, adequate and complete remedy at law. He, therefore, under the allegations of the complaint, had no right to invoke the jurisdiction of a court of equity to secure the relief to which he claims he was entitled. *Dall v. Bland*, 93 Ark. 266; Kirby's Dig., § 3986.

The demurrer to the complaint should have been sustained. Decree reversed, and cause remanded with directions to sustain the demurrer and dismiss the complaint.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. JACKSON.

Opinion delivered November 14, 1910.

1. APPEAL AND ERROR—HARMLESS ERROR.—While it is error to give an instruction inapplicable to the evidence, such error will not be ground for reversal if it was harmless. (Page 472.)
2. SAME—HARMLESS ERROR.—Where a railroad company owed a duty to plaintiff to use ordinary care to avoid injuring him, and failed to discharge such duty, whereby plaintiff was injured, an instruction relative to such duty was not prejudicial merely because the reason assigned why defendant owed the duty was erroneous. (Page 473.)
3. RAILROADS—DUTY TO PERSONS NEAR TRACK.—It is the duty of a railroad company to use ordinary care to avoid injuring persons who may be rightfully near its track; and if in such case a person is injured by the operation of its train, the sole question is whether or not it was guilty of any act of negligence which caused the injury. (Page 473.)
4. SAME—INJURY TO ONE TRESPASSING UPON STRANGER'S PREMISES.—A railroad company is not excused from the duty to use ordinary care to avoid injuring a person who may rightfully be near its tracks because such person is a trespasser upon the property of an adjacent landowner. (Page 474.)

Appeal from Crawford Circuit Court; *Jephtha H. Evans*, Judge; affirmed.

Lovick P. Miles, for appellant.

1. There was no legal obligation upon appellant to exercise care to make the use of the cotton warehouse platform safe for appellee. This case does not fall within the doctrine announced in *Brinkley Car Co. v. Cooper*, 60 Ark. 545, and 70 Ark. 331-5, and the court's instruction numbered 1 is erroneous. 48 Ark. 491-3, and cases cited; 77 Ark. 561; 89 Ark. 122; 69 N. H. 649; 57 Ark. 461; 101 Pa. 258; 7 Texas Civ. App. 65; 26 S. W. 474; 90 Ark. 278.

2. There is no evidence on which to base the instruction. 87 Ark. 471; 77 Ark. 109; *Id.* 261.

C. A. Starbird, for appellee.

1. The presumption is that appellee was rightfully on the platform, and appellant would not be permitted to question his right to be there without first showing ownership or possession in itself. But, even if he were a trespasser, appellant would nevertheless, under the circumstances of this case, be liable. Its negligence consists in so using its property as to tear down the platform and thereby injuring appellee and, being guilty of negligence in tearing down the platform, it is liable for the whole damage. Appellant itself was a trespasser, and can not exempt itself from damage for its fault, negligence and trespass, by charging appellee with being a trespasser. 29 Cyc. 459, 495.

2. Appellee's case was made when he proved the injury, and that it was done or caused by the operation of appellant's train. The burden was then upon it to avoid liability by proving unavoidable accident or contributory negligence. 82 Ark. 443-4; 87 Ark. 581; *Id.* 308; 83 Ark. 217; 81 Ark. 275; 73 Ark. 553; 65 Ark. 235. And whether an injured person is or is not a trespasser under circumstances of this case is a question for the jury. 52 Ark. 368; 63 Ark. 636; 70 Ark. 481; 74 Ark. 610; 126 S. W. 850. Trespass on appellant's road or right-of-way would have been contributory negligence, but trespass on the land of a third party would not have been such negligence as to appellant, and is not a defense, even if proved, of which it could take advantage.

FRAUENTHAL, J. This was an action instituted by Bruce Jackson, a minor, by his next friend, to recover damages for personal injuries which it was alleged he sustained by reason of the negligence of appellant. The plaintiff was standing upon a platform next to the right-of-way upon which appellant operated its trains, and it was alleged that appellant carelessly and negligently ran one of its cars against the platform, and broke the same down, and thereby injured the plaintiff. The platform was attached to the front part of a cotton warehouse owned by the "Farmers' Union," and it was built by and wholly located on land owned by the "Farmers' Union." It was situated in the town of Mulberry, and from one to three feet from ap-

pellant's right-of-way. At this place the appellant had built a switch or spur track which extended from its main or another switch track past the warehouse to a creek at which ties were loaded on cars. The testimony on the part of the plaintiff tended to prove that by the side of this "tie spur" there was a beaten pathway along which the public was accustomed to travel. On this occasion the plaintiff travelled along this pathway to the platform, and at the time was on his way to a house upon the creek where he had left his overalls the day before. The platform was about ten feet long and about five feet wide, and was situated at the front of the warehouse for the purpose of loading cotton therefrom on to the cars, but it was not located on any part of the right-of-way or property of appellant. It was located along this pathway upon which the plaintiff was traveling, and at the time he reached the platform the appellant was engaged in moving cars upon the "tie spur." It was necessary for the plaintiff, in order to go to the house where his overalls were, to cross over the "tie spur" at a point below the warehouse in the pathway which crossed the "tie spur" at that place, and he therefore waited at the warehouse for the train to clear this track. In order to secure a place where he would be safe from any danger from the cars while the train was thus being moved upon this spur track, the plaintiff stepped upon the platform, and leaned up next to and against the warehouse. In the train there were some box cars and also some cars known as "dump" or "cinder" cars. These "dump" or "cinder" cars were constructed with doors upon the sides which were fastened at the top and swung out from the bottom. The doors were supplied with fastenings at the bottom so that they could be kept securely closed. On this occasion the "dump" cars were empty, and the doors were negligently left unfastened, so that they swung out from the sides of the car for some considerable space as the train moved along the rough and unevenly-built "tie spur." As the train passed this platform upon which the plaintiff was standing, the swinging door of one of these "dump" cars struck the platform, and knocked it down with great force, and crushed the plaintiff between the warehouse and the platform, thereby severely injuring him.

The appellant requested the court to give the following instructions to the jury, which were refused:

"2. Defendant owed plaintiff no duty except to not wilfully, wantonly or recklessly injure him after the employees actually saw him on the platform and actually realized he was likely to be injured, and before plaintiff can recover he must prove by a preponderance of the evidence that defendant saw plaintiff on the platform, knew that he was likely to be injured, and all in time to have saved him by the exercise of ordinary care, and thereafter failed to exercise such care, and such failure caused his injury."

"3. The evidence in this case is insufficient to sustain a finding that the handling of the car with a swinging door at the time and place was such negligence as would entitle plaintiff to recover on account thereof, and you will so find."

Thereupon the court among other instructions gave the following:

"1. If the cotton platform attached to the union warehouse was erected and maintained to load cotton into defendant's cars for shipment, then defendant was bound by law to exercise ordinary care not to injure any one who might reasonably be expected to be on the platform in connection with the business of loading cotton into the cars. And if such a platform is a place that may naturally and reasonably be expected to attract children of plaintiff's age and development to be upon it for play or for watching the movement of cars, or for any other childish or lawful purpose, then defendant owed such children so there, or that might reasonably be expected to be there, the duty of using ordinary care in the handling of its cars and trains so as not to strike the platform and wound or injure such children so upon it."

The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has prosecuted this appeal.

It is urged by counsel for appellant that the court erred in giving the above instruction number 1, because it is not applicable to the state of case made by the evidence, and is not supported by any testimony adduced upon the trial of the case. And to this extent we think that this contention is well founded. The injury occurred in the month of July, and there was no testimony introduced tending to prove that any cotton was being

loaded or unloaded at this warehouse or platform at that time or season, from which it could be inferred that the appellant or its employees might reasonably have expected persons to be on the platform engaged in that business or work. Nor do we think that the testimony was sufficient to show that the doctrine evolved in what is known as the "turntable cases" was applicable to this case. The principle involved in those cases is that where the owner maintains upon his own premises an object of an uncommon character, which is dangerous in its nature, and to which he might reasonably expect that children too young to appreciate the danger would be allured and attracted, he is liable for the consequent injury to them therefrom. But in this case the platform was not on appellant's premises, and it therefore was not incumbent on it to guard or protect children therefrom, even if the platform was enticing or attractive to them; nor was it of such a nature or so located that it can be said that appellant might reasonably have expected that children would be allured and attracted to it. The testimony of the plaintiff is that he went to the platform, not from curiosity, but to seek a place of safety. But it does not follow, because this instruction was erroneous, that the giving of it was prejudicial. It is true that actionable negligence is based upon the failure to discharge a duty to the person injured, and that the court by this instruction predicated that duty upon a state of facts not disclosed by any testimony in the case. But if the appellant under the facts and circumstances of this case owed to the plaintiff a duty which it failed to discharge, and thereby he was injured, the instruction would not be prejudicial, although the reason given by the court why the appellant owed that duty to plaintiff was erroneous.

Thus, it is the duty of a railroad company to use ordinary care to avoid injuring persons who may be near its tracks and who are rightfully at such place; and if in such case a person is injured by the operation of its train, the sole question is whether or not the railroad company was guilty of any act of negligence in the operation of the train which caused the injury. In the case of *St. Louis, I. M. & S. Ry. Co. v. Neely*, 63 Ark. 636, the railway company was operating its freight train along a street in the town of Warren, and while the train

was passing Neely in the street where he had a right to be a car door fell from its place in the car and injured him. In that case the court said: "The railroad company owed him the duty to employ reasonable care to avoid injuring him." So in the case of *St. Louis & S. F. Rd. Co. v. Carr*, 94 Ark. 246, where a traveler at a public crossing was injured by a door projecting from a moving train, it was held that, he being rightfully at such place, the railroad company owed to him the duty to use ordinary care to avoid injuring him. *Shearman & Redfield on Negligence* (3 ed.), 477; 33 Cyc. 1146; *Doyle v. Chicago, St. Paul & K. C. Ry. Co.*, 4 L. R. A. 420. And so this duty, the violation of which constitutes actionable negligence, may arise in various ways. It is a maxim of law that one owes the duty to others to so use and manage his own property as not to injure another. That is an obligation resting upon a corporation, just as it does upon a natural person. *St. Louis, I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 357; *Railway Co. v. Lewis*, 60 Ark. 409; 2 *Shearman & Redfield, Neg.*, § § 688a-701a. As is said by Mr. Cooley in his work on Torts (page 630): "For negligence in a legal sense is no more nor less than this, the failure to observe for the protection of the interest of another that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." The nature and extent of the duty owed to the person injured determines the degree of the care that should be exercised for his safety, and not the reason for such duty. If the appellant owed to the plaintiff a duty which it failed to discharge, and thereby he was injured, it would still be liable for such injury, although a correct reason may not have been given why it owed him such duty.

But it is urged by counsel for appellant that plaintiff was not rightfully on the platform, and was therefore a trespasser; and that on this account the railroad company only owed to him the duty not to wilfully, wantonly or recklessly injure him after the appellant's employees discovered his perilous situation, and knew of his danger. It has been uniformly held that where a person is upon the right-of-way or property of a railroad company at a place other than at a public crossing, without authority,

permission or license of the company, he is a trespasser, and that to such trespasser the railroad company owes only the duty to avoid injuring him after the perilous situation of such person has been discovered. 2 Shearman & Redfield, Neg., § 705; 2 Cooley on Torts, p. 1268; 2 Thompson on Neg., 2103. But in this case the plaintiff was not a trespasser upon the right-of-way or property of appellant. The platform upon which he was standing was wholly off the land of the appellant, and was solely the property of an adjoining landowner. It is true that the testimony does not show that the plaintiff had the authority or permission of the owner of the platform to be thereon, and as to such owner he may have been a trespasser. The controlling question then is whether the appellant under these circumstances only owed the plaintiff the duty that it owed to a trespasser upon its own property, or whether it owed to him the duty to exercise the care required for the protection of the owner of the abutting land or of one rightfully thereon. Every abutting landowner has the right to insist that the railroad company shall be under the duty and obligation to use ordinary care in the operation of its trains so that his person or property may not be injured thereby. "This duty is due, not only to the abutting landowner, but to every person along or who may pass along, but not on, the right-of-way." *West Virginia C. & P. Ry. Co. v. Fuller*, 61 L. R. A. 574. A person must exercise ordinary care in the use of his own premises and the instrumentalities operated thereon so as not to injure the property or person on abutting premises, and for a failure to use such care he is liable for a consequent injury to such adjoining owner. *Defiance Water Co. v. Olinger*, 32 L. R. A. 736. And the same rule applies where the person injured upon the abutting premises is there only by permission of the owner or without such permission. In such case he is not a trespasser upon the premises of the owner by whose negligence the injury is caused; nor does it concern such negligent party or relieve him from consequent liability that he is a trespasser upon the premises of an adjoining owner.

In the case of *Wilson v. American Bridge Co.*, 77 N. Y. Supp. 820, the plaintiff was injured by hot water and steam discharged from a pipe on defendant's premises. The defendant

was a manufacturing corporation, and its plant was contiguous to the premises of a railroad company, where plaintiff was at the time the steam and water were expelled on him. In that case the court said: "I do not consider it as very significant in the solution of this case whether or not the plaintiff was a trespasser upon the lands of the railroad company. The use of the pathway was extensive, and it was no concern of the defendant whether this use was rightful or against the will of the owner. That question might be cogent if the railroad company were the party, but it may not be urged to relieve the defendant of liability."

In the case of *Wittleder v. Illuminating Co.*, 62 N. Y. Supp. 297, the plaintiff was standing upon a platform located on the property of a railroad company, and was injured by coming in contact with an electric wire belonging to the defendant. In that case the court said: "The defendant's exceptions raise a question as to the contributory negligence of the boy in that he was not lawfully on the platform, and therefore was a trespasser. We do not think this is a question which can be raised by the defendant, as not it but the railroad company was the owner of the platform. It may be conceded that the boy was a trespasser as against the railroad company, and that there could have been no recovery against it. * * * For all that appears, the defendant was just as much a trespasser on the railroad structure as according to its claim the boy was. At any rate, the defendant is not in a position to defeat the action on the ground referred to."

And so in the case at bar it does not concern the appellant whether the plaintiff was on the platform with or without the permission of the owner; he was not a trespasser upon the property of appellant. It therefore owed to plaintiff, under the facts and circumstances of this case, the duty to exercise ordinary care in the operation of its train to avoid injuring him; and if it failed to discharge that duty, it was guilty of negligence and liable for the consequent injury. Under the facts and circumstances of this case, we think that it was a question for the jury to determine whether or not the appellant was negligent in the operation of its train and cars which caused the injury. Upon this question of negligence the court in other instructions

given by it properly instructed the jury. The court did not err, therefore, in refusing the above instructions requested by appellant, nor did it commit an error prejudicial to its rights by giving the above instruction number 1 upon its own motion. Counsel for appellant concede that there was sufficient testimony to sustain the amount of the verdict returned by the jury. Upon an examination of the whole case, we do not find that any prejudicial error was committed in the trial, and the judgment is accordingly affirmed.

McCAMEY v. WRIGHT.

Opinion delivered November 14, 1910.

1. EVIDENCE—PRESUMPTION THAT OFFICER DOES DUTY.—The law presumes that every officer does his duty and that in his official acts he has not exceeded his authority, and if he can act only in a certain contingency that such contingency has happened. (Page 479.)
2. SHERIFFS AND CONSTABLES—ASSAULT—PRESUMPTION—BURDEN OF PROOF.—In an action against a constable for unlawfully killing plaintiff's decedent it was not error to refuse to instruct that if the decedent was unhurt when taken into custody, and was found to be hurt before his trial on the next day, the defendant must show how he was hurt, as such instruction would overturn the presumption that an officer does his duty, and change the burden of proof in such cases. (Page 479.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; affirmed.

Cammack & White, J. A. Comer and J. H. Carmichael, for appellant.

1. After plaintiff by evidence established the facts that deceased at the time of the arrest was well and uninjured and that between that time and his trial he received an injury which resulted in his death, the burden was upon appellees to prove that deceased was injured by some agency over which they had no control. 3 Cyc. 1087; *Id.* 1104. Instructions 6 and 7 requested by appellant should have been given. 69 Ark. 134.

2. As to the officer's liability for unwarranted insults, indignities, cruelty or oppression to the person arrested, see 85

Ky. 486; 144 Mass. 365; 7 Blackf. 74; 31 Am. Rep. 626; 42 L. R. A. 423; 55 Ark. 502; 59 Ark. 133; 9 L. R. A. 445.

W. R. F. Payne and *W. T. Tucker*, for appellee.

1. Where the law governing a case is correctly stated in instructions already given, it is not error to refuse instructions upon the same questions. 90 Ark. 19; 87 Ark. 602.

2. Instructions 6 and 7, requested by appellant, were properly refused. They assume that deceased was in the custody of Rogers continuously from the time of his arrest until he was brought into court the next day. The burden was on plaintiff to show that Rogers had assaulted deceased while in his custody, and, until she did so, Rogers was under no duty to explain anything. The issue was, did Rogers commit the assault? The jury's verdict, on conflicting evidence, settles that question in appellee's favor. 73 Ark. 377; 75 Ark. 111; 67 Ark. 339; 65 Ark. 116; *Id.* 255; 67 Ark. 433; 76 Ark. 326; 46 Ark. 524; 47 Ark. 196.

KIRBY, J. This is an action by appellant as administratrix for damages for the wrongful death of her son and intestate, Louis Hunley, against Ed Wright, constable, and F. C. Rogers, his deputy, it being alleged that such death was caused by the said Rogers unlawfully assaulting and striking said deceased on the head with a pistol.

The answer denied that an assault was committed upon deceased by defendant Rogers. The testimony shows that deceased was on Washington Street in Argenta the night before Christmas, intoxicated to some extent, and that he was arrested by F. C. Rogers for being drunk; that at the time he was uninjured, and went with the officer without resistance; that within ten minutes afterwards he was seen on the street, crying, with blood running down on his shoulder, with a pair of handcuffs on, or one handcuff, and complaining, "He hit me on the head." Shortly afterwards he was taken up the street, and turned over to Mr. Rogers, who claimed he had escaped.

There was a bruise on his head, caused by a blunt instrument that fractured his skull, and from which, after suffering great pain, he died about the middle of March afterward. The evidence was contradictory and conflicting to some extent, and the defendant, Rogers, did not testify in the case.

The court refused to give instructions numbered 6 and 7, requested by plaintiff, which are as follows:

"6. You are instructed that if you find from the evidence that the deceased was unhurt and uninjured when taken into custody by defendant Rogers, and was found to be hurt and injured before his trial on the next day, the defendant must show by a preponderance of the evidence how the deceased was hurt.

"7. If you find from the evidence that the deceased, Louis Hunley, was uninjured when he was taken into custody by defendant Frank Rogers, and you further find that he was injured when brought into court the following day in the custody of Frank Rogers, you will find for the plaintiff, unless you find that deceased, Louis Hunley, was injured by some one else not under control of defendants."

And gave, over plaintiff's objection, defendant's instruction:

"The jury are instructed that, before the plaintiff can recover, they must show by a fair preponderance of the evidence that the injury complained of was wrongfully and unlawfully inflicted by defendant Rogers, and that said injury was the natural, proximate cause of the death of the said Hunley; and if they fail in this, your verdict should be for the defendants."

The jury returned a verdict for the defendants, and plaintiff appealed.

There was no error in giving the instruction asked on the part of the defense. It was approved by this court in this cause on a former appeal.*

"The presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption. So it will always be presumed that in any official act or act purporting to be official the officer has not exceeded his authority; and, if he had power to act only in a certain contingency, that the contingency has happened, etc." Throop on Public Officers, § 568; Mechem, Public Officers, § 579.

Instruction number 6, refused, asked the court to declare that it was the defendant's duty to show by a preponderance

*The opinion in *McCamey v. Wright*, handed down on May 17, 1909, was omitted from 90 Arkansas Reports by order of the Chief Justice. —(Rep.)

of testimony how the deceased was injured if he was unhurt when taken into custody by him and found to be injured before his trial next day, without regard to whether or not deceased was shown to have been in his exclusive custody during all the time. And the effect of number 7 was to conclusively presume that deceased was injured by the defendant if he was unhurt when arrested and injured when brought into court the following day in his custody, unless the jury should find that deceased was injured by some one else not under control of defendant.

These instructions seek to overturn the long-established presumption of law that every officer has discharged his duty, and change the rule of evidence as to the burden of proof, which was correctly given to the jury by the court in defendant's instruction objected to. Neither of them was a correct statement of the law, and both were properly refused. The jury might well have found for the plaintiff, but the evidence was contradictory and conflicting to some extent, and it was their province, under the instructions given by the court, to find whether or not deceased had been assaulted and injured by the defendant. Their verdict, being for the defendant and not without evidence to sustain it, will not be disturbed by this court.

Affirmed.

McVEIGH v. CHICAGO MILL & LUMBER COMPANY.

Opinion delivered November 14, 1910.

1. MASTER—EFFECT OF REFERENCE.—Where the record in a chancery case shows that a special master was appointed by agreement of the parties, without stating what was referred to him, it will be inferred that the court's order intended to invest him with the powers and to charge him with the duties prescribed by Kirby's Digest, § 6333, which are to take testimony and state an account between the parties according to the facts. (Page 489.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CONSENT MASTER'S FINDINGS.—Findings of fact of a consent master are as conclusive as the verdict of a jury or the findings of fact by a court sitting as a jury. (Page 489.)

3. **SAME—CONCLUSIVENESS OF MASTER'S FINDINGS OF LAW.**—Where questions of law were not expressly referred to a consent master, the parties are not bound by his conclusions of law. (Page 489.)
4. **MASTER—REFERENCE—QUESTIONS OF LAW.**—Where the parties consented to the appointment of a master, but did not expressly consent that questions of law should be referred to him for decision, it is the duty of the court to determine such questions. (Page 489.)
5. **ABSTRACTS OF TITLE—CONSTRUCTION OF CONTRACT.**—Under a contract whereby plaintiff, undertaking to abstract the title to defendant's lands, agreed to give a complete transcript of all special acts of Congress, or of the State, plaintiff was not required to abstract the act of Congress of September 28, 1850, granting swamp lands to the States, nor the act of Congress donating internal improvement lands, nor the several statutes of this State curing defective conveyances and acknowledgments. (Page 490.)
6. **SAME—CONSTRUCTION OF CONTRACT.**—Under a contract requiring plaintiff to make a complete transcript of special acts, he is not entitled to charge for a summary of a special act. (Page 490.)
7. **SAME—CONSTRUCTION OF CONTRACT.**—Under a contract requiring the plaintiff to abstract all matters affecting vitally or historically the title to defendant's lands, and fixing the charge therefor, plaintiff was not required to abstract the minutes of the St. Francis Levee Board, nor the delinquent lists of the levee tax collectors, since the decrees of the chancery court foreclosing the lien of the levee tax were conclusive of all matters adjudicated therein. (Page 491.)
8. **SAME—CHARGE FOR TRANSFERS.**—Under a contract whereby an abstracter of titles was entitled to charge for each "transfer" of land, the abstracter is entitled to charge, as for separate transfers, for each selection and approval of swamp lands, for the patent to the State, for the entry in the State land office of the patent to individuals; so also for a contract to convey, as well as for the deed executed pursuant thereto. (Page 491.)
9. **SAME—CONSTRUCTION OF CONTRACT.**—Where plaintiff prepared the contract under which he sought to charge for abstracting "tax forfeitures," the contract should be construed against him, and should not be held to include all antecedent steps with reference to the assessment of taxes. (Page 491.)
10. **SAME—CHARGE FOR TRANSFERS.**—Under a contract whereby plaintiff was to transcribe tax deeds, but to charge for them as transfers of title, regardless of the number of pages used in copying them, plaintiff was not entitled to charge by the page for copying such tax deeds. (Page 492.)
11. **SAME—CONSTRUCTION OF CONTRACT.**—Under a contract which provided for the preparation of abstracts of title of "all decrees, orders of court, tax forfeitures, and miscellaneous matters appearing in

each and every abstract, of record or on file, affecting vitally or historically, the title to the land embraced therein," the abstracter was not entitled to charge for abstracting records which did not vitally or historically affect the title to the land. (Page 492.)

12. SAME—CORRECTION OF INACCURACIES.—Where an abstracter offered to correct inaccuracies in his abstracts as soon as his attention was called thereto, and still offers to do so, he should not be charged, as against his claim for compensation, with the expense of having such corrections made by others. (Page 492.)

Appeal from Mississippi Chancery Court, Chickasawba District; *Edward D. Robertson*, Chancellor; reversed.

Allen Hughes, for appellant.

1. The contents of the abstracts are to be judged by the terms of the contract. While there is much in the abstracts that is not indispensable, and would not appear in the ordinary abstract, yet they are what the appellee wanted and contracted for. The contract is a reasonable one, and appellee should not escape payment for the work done because subsequent events have lessened the need of information so detailed and complete.

2. Appellee is bound by the interpretation placed upon the contract by the parties themselves in the conferences and negotiations between its attorney and McVeigh, resulting in the latter agreeing to reduce his gross charge for the work $7\frac{1}{2}$ per cent., appellee in coming to such agreement necessarily acceding to his contention that the contents of the abstracts were in accordance with the contract. 95 U. S. 269; 46 Ark. 131; 52 Ark. 65; 55 Ark. 418. Moreover, there was a complete ratification of the work, in that appellee's attorney, seeing what was going into the abstracts and the manner in which the work was being done, made no objections at the time. Story on Agency, § 244; 83 Ark. 446. The agreement with Gilbert amounted to a compromise and settlement of the controversies between the parties. 8 Cyc. 501; 137 U. S. 78, 85; 47 Ark. 335; 75 Ark. 266.

3. Each separate transaction, separately of record, affecting the title, constitutes a transfer within the meaning of the contract. Anderson's Law Dict., 55 N. Y. 22; 36 Conn. 429.

W. C. Gilbert, Charles T. Coleman and Hawthorne & Hawthorne, for appellee.

1. The findings of the master as to all facts where there was evidence to support them are conclusive. The appointment

of the master by the parties themselves in vacation, without any reservation, conferred upon him full power to pass upon and construe the contract and upon all questions arising in the case. 129 U. S. 512; 74 Ark. 338; 85 Ark. 414; 155 U. S. 636; 144 U. S. 585; 145 U. S. 132; 92 Ark. 359. Appellee is not estopped from questioning the abstracts or the amount charged for the work. There is nothing in the record to show that either party treated the examination made by Mr. Gilbert as an acceptance or approval of the abstracts or of the manner in which they were made. If appellant McVeigh was relying upon an approval, or ratification, of his work, undoubtedly he would have mentioned it in his correspondence. 53 Ark. 201; 46 Ark. 131; 52 Ark. 65; 55 Ark. 418; 95 U. S. 269; 15 Ark. 319; 13 Ark. 217; 82 Ark. 367; 36 Ark. 114.

2. By "per transfer" is meant that where lands have been transferred from one person to another, the appellant should be paid $66\frac{2}{3}$ cents "per transfer," without regard to the number of pages used in furnishing that information.

3. The words "tax forfeitures" mean, not proceedings culminating in tax sales, as contended by appellant, but a record of the sale alone, either to the State or to an individual. 3 Words & Phrases, 2899; 3 Kan, 364-5; Kirby's Digest, § 4833.

4. The Swamp Land Act is a general law, not a special act. 72 Ark. 195; 75 Ark. 120; 7 Words & Phrases, 6577; 5 Nev. 111. That it is a general law, the courts take judicial notice. 99 Ind. 63; 126 Ind. 398. The act creating the St. Francis Levee District is also a general law, of which the courts take judicial notice. 42 Ark. 592; 20 Ark. 204; 6 Ark. 123; 10 Ark. 423; 36 Ark. 663; 23 Ark. 387; 16 Cyc. 891.

McCULLOCH, C. J. Defendant, Chicago Mill & Lumber Company, owned lands in eastern Arkansas, and employed plaintiff McVeigh to make abstracts of title. They entered into a written contract concerning the matter, dated February 10, 1903, which writing was prepared by McVeigh in accordance with proposals previously made by him to defendant and accepted by the latter. That portion of the contract which is material to this controversy reads as follows:

"That said party of the first part, in consideration of the payments, and upon the conditions herein expressed, upon his part agrees:

"1. To prepare for said party of the second part complete and accurate abstracts of title to all the lands owned by said party of the second part, lying, being and situate in the counties of Craighead, Poinsett and Mississippi, in the State of Arkansas, at and for the sum of sixty-six and two-thirds ($66\frac{2}{3}$) cents per transfer, for each and every transfer appearing in each and every abstract, and sixty-six and two-thirds cents per page, or fraction thereof for all decrees, orders of court, tax forfeitures, and miscellaneous matters appearing in each and every abstract, of record or on file, affecting vitally or historically the title to the lands traced therein, each and every section, part of section or tract of land to be abstracted separately and independently of all others, according to its independent chain of title, provided, that no abstract of title shall trace the title to more than one section of land.

"2. That such compiled data shall include all matters of record in the general land office of the United States Government, at Washington, D. C., the register of the land office of the United States Government, at Little Rock, Arkansas, and the Commissioner of State Land Office, at Little Rock, Arkansas, as well as all matters of record or on file in the counties above mentioned.

"3. That said first party shall give a complete transcript of all decrees, orders of court, or documents on file of whatever nature (as well as all special acts of Congress, or the State Legislature), including all tax deeds, provided, that this is not to be construed to mean and include ordinary deeds, mortgages and similar conveyances; and shall append to each deed, mortgage or other instrument, such full, complete and accurate notes and memoranda as may be necessary to a proper explanation and understanding of same, as well, also, to all decrees or miscellaneous documents, when, in his judgment, same as may appear necessary. * * *

"10. For all of above the said party of the second part, on its part, hereby agrees to pay to the said party of the first part, upon the final completion and delivery of said above-described work, the sum of sixty-six and two-thirds cents per transfer or page for same as more particularly described and set out in paragraph number 1 (first), it being agreed that the

plan of the work contemplates the abstracting of each parcel or tract of land separately and independently of the others, and to be paid for at the said rate for each transfer or page contained in each and every one of said abstracts."

Plaintiff McVeigh proceeded with the work of preparing the abstracts, and during the progress thereof defendant advanced to him the sum of \$9,000 on the price. Before the completion and delivery of the abstracts, the parties entered into a further agreement with reference to a reduction of the contract price. This is evidenced by a letter of McVeigh to the defendant, dated September 26, 1904, as follows:

"I beg to confirm to you what I have already stated to your Mr. Gilbert, that, in consideration of your having made advances to me in the past to be credited to you on account of our contract of February 10, 1903, and of your agreement to advance me the further sum of \$1,500, as follows: \$500 on account of September, \$400 October 1, \$400 November 1, and \$200 December 1, which advances are likewise to be credited to your account, I have agreed to give you a discount of $7\frac{1}{2}$ per cent. on the gross amount of your bill."

Further advances were thereafter made by defendant, pursuant to this agreement. McVeigh completed the abstracts and delivered them to the defendant and rendered a bill for the service, claiming payment for 36,083 transfers and pages, amounting, at the contract price, to \$24,055.33. Payment was refused, and plaintiff and his assignee instituted this action against defendant in the circuit court of Mississippi County to recover the amount alleged to be due for said service according to the contract price, after deducting $7\frac{1}{2}$ per cent. from the gross amount and the sum of \$9,000 advanced, leaving a balance of \$13,251.10 claimed to be due and unpaid.

Defendant answered the complaint, disputing the amount of the account, and alleging in substance that McVeigh had not complied with the contract; that the abstracts were incorrectly and improperly prepared and contained thousands of pages of useless, immaterial and irrelevant matter not covered by the contract, and that the same were grossly padded for the purpose of increasing plaintiff's claim for the service. These objections are set forth in detail in the answer. An additional credit of

\$539.50 is also claimed over and above the sum of \$9,000, being for a draft alleged to have been paid for plaintiff. The answer contained a motion to transfer the cause to the chancery court and for reference to a master to take proof and state an account between the parties.

The case was transferred to the chancery court, and the following order of reference is found in the record, which was entered at the October term, 1907: "The agreement of counsel for the appointment of Basil Baker, Esq., as special master in this cause, is filed, and the appointment of said master, made in vacation, is by the court confirmed." There is no prior order in the record concerning the reference to a master, and the agreement of counsel mentioned in the order of the court is not in the record.

The special master took testimony adduced by the respective parties, and made his report to the court, finding that, after eliminating duplicates found in the abstracts, they contained 24,274 pages, and that 18,037 pages were not chargeable under the contract. He stated the account as follows:

Number of pages furnished by McVeigh -----	34,274
Deduct	Pages
Swamp land grants copied -----	610
Act creating St. Francis Levee District -----	1,446
Curative acts -----	912
Internal improvement act -----	32
Donation act -----	89
Minutes of St. Francis Levee Board -----	3,289
Transfers -----	2,115
Tax forfeitures -----	4,786
Tax deeds -----	456
Overdue tax items -----	4,441
	<hr/>
	18,176
	<hr/>
	16,098
Add.	
Errors (corrected in second report) -----	139
Abstracts delivered but not produced -----	312
	<hr/>
	451
	<hr/>
Total number of pages to be paid for -----	16,549

Amounts.

16,549 pages at 66 $\frac{2}{3}$ cents -----	\$11,032.67	
Discount, 7 $\frac{1}{2}$ per cent. -----	\$227.45	
Advances -----	9,539.55	10,367.00
<hr/>		
Amount due McVeigh -----	\$	665.67
Cost of correcting abstracts -----	\$1,520.00	
Amount due McVeigh -----	665.67	
<hr/>		
Amount overpaid by company -----	\$	854.33

Plaintiff filed exceptions to the master's report and findings, some of which were sustained and some overruled. The court restated the account as follows:

Number of pages for which plaintiff is entitled to charge, 28,000

Deduct	Pages	
Transfers -----	2,115	
Tax deeds -----	456	
Curative acts -----	914	
Levee board donation -----	89	3,574
<hr/>		24,426

Amounts.

24,426 pages at 66 $\frac{2}{3}$ cents per page -----	\$16,284.00	
Discounts 7 $\frac{1}{2}$ per cent. -----	\$1,221.30	
Advances -----	9,539.50	10,760.80
<hr/>		

Amount due McVeigh ----- \$ 5,523.20

The court also decided that McVeigh, having offered to correct the errors found in the abstracts, no deduction should be made on that account. A decree was rendered in favor of plaintiff in the sum of \$5,523.20, and both sides appealed to this court.

Plaintiff contends that while the work of preparing the abstracts was in progress, and after some of them were complete, so that the matter contained therein could be easily seen, defendant's agent and attorney examined them with considerable care and made no objection thereto, but, on the contrary, while defendant's said attorney was in possession of full knowledge of what the abstracts contained, the new agreement was

entered into for reduction, or for discount of $7\frac{1}{2}$ per cent. on the original contract price in consideration of the advances already made and to be made by defendant. Testimony was adduced on both sides directed to this contention, and the special master stated his findings and conclusions on this issue as follows:

"I find there have been inserted in many of these abstracts matters which were not contemplated in the execution of the contract, and that the defendant through its agents is not shown to have known that such matters were inserted in the abstracts, and that neither Mr. Gilbert, Mr. Wilms nor Mr. Beckham could have known these matters were inserted in the abstracts from such an examination as was made, in the condition in which the abstracts were at the time that they are said to have examined them. The volume of the work was such that no one in the period of three or four days could form any estimate or accurate opinion of what they contained, unless some one had called attention to these particular matters; and it is not shown this was done, and the appellee, nor its agents, did not know of the insertions of the numerous levee board proceedings, and minutes of the purported abstract of the act creating the Levee District, instead of a copy of the same, the curative acts, and of numerous reports and settlements in overdue tax proceedings, and county court orders and other matter of a similar kind. If it had known all these things, the correspondence convinces me that Mr. McVeigh did not consider at the time of the agreement to make further advances amounting to \$1,500, nor for a long time thereafter, that appellee waived anything in the agreement except its right to refuse to advance the amount, which it need not have done, but which it did do in consideration of the seven and one-half per cent. reduction from the amount that might be found due at the completion of the work. Mr. McVeigh does not claim to have suffered any injury in having acted upon a supposed settlement or ratification or compromise; nor that he would have acted other than he did, had not the alleged examination and approval been given. It is true that he gave up seven and one-half per cent. of the gross amount of his bill, but he offered to pay 10 per cent. on his advances, and I find his seven and

one-half per cent. to be the price he was willing to pay for the advancement to him, before it was due, [of] the further sum of \$1,500, as well as the \$7,500 already advanced him. I find therefore that there has been no account stated as alleged in the complaint."

The chancellor sustained plaintiff's exception to this finding, and held that "both parties acquiesced in a practical construction of the contract, the abstracts being exhibited to defendant's attorney, who either examined the abstracts or had the opportunity to do so," but that plaintiff, McVeigh, "having stated to appellant that the work would amount to 28,000 pages, cannot be allowed more pages."

It is important to consider, in the first place, the nature of the reference to the special master and the effect which should be given to his findings of fact and conclusions of law. It was a reference by consent of parties. The stipulation is not in the record, but the court's order shows clearly that the reference was made on account of an agreement of the parties that the case should be referred to a special master of their own selection. It was not merely a selection of a master, but it was also a consent reference to a special master. The court merely ratified the agreement of the parties. The order does not specify the powers of the special master, so it must be inferred that it was intended to invest him with powers and charge him with the duties prescribed by statute, which are to take testimony and state an account between the parties according to the facts. Kirby's Digest, § 6333. "The findings of fact by a consent referee (or master) have the same conclusiveness as the verdict of a jury or findings of fact by a court sitting as a jury. * * * Where there is any testimony legally sufficient to support such findings, they will not be set aside." *Greenhaw v. Combs*, 74 Ark. 336; *Paepcke-Leicht Lumber Co. v. Collins*, 85 Ark. 414; *Griffin v. Anderson-Tully Co.*, 91 Ark. 292; *Carr v. Fair*, 92 Ark. 359.

The testimony is conflicting, but it is sufficient to sustain the findings of fact by the master, and they should not be set aside. There was no express reference to the master of questions of law; therefore the parties are not bound by his conclusions of law. *Greenhaw v. Combs*, *supra*; *Davis v. Schwartz*,

155 U. S. 631. The interpretation of the contract was a question of law, and the parties were not bound in that respect by the conclusions of the master. *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 140.

It is the duty of the court to determine all questions of law in a case where there has been no express consent that the same shall be referred to a master for decision. It follows, therefore, that the court should interpret the contract as a matter of law, and apply it to the facts found by the master. We accept as conclusive the finding that the abstracts furnished by McVeigh, after excluding the duplicates, contained therein 34,274 pages and transfers, with an addition of 451 pages reported by the master in a later report, making a total of 34,725.

We therefore proceed to determine what deduction should be made of the pages of the abstract not called for by the contract.

The items to be first considered is 610 pages for transcribing acts of Congress of September 28, 1850, granting swamp lands to the States. That act is general in its terms, and applies to all lands in the States of the character described. This is not a special act of Congress within the meaning of the contract. This excludes the 610 pages claimed on that item. The same applies to the act of Congress donating internal improvement lands, and the several statutes of this State curing defective conveyances and acknowledgments. Nine hundred and forty-four pages were properly excluded by the master on account of those two items.

Eighty-nine pages for abstracting the act of the General Assembly donating lands to the St. Francis Levee District were excluded, both by the master and by the chancellor. The only ground upon which it is contended these pages should be included is on account of the presumed acquiescence in the insertion of these pages in the abstract. The finding of the master is conclusive as to this.

A majority of the judges hold that, even if the act of the General Assembly creating the St. Francis Levee District should be deemed a special act within the meaning of the contract, plaintiff is not entitled to pay for abstracting it, since he did not transcribe it in full, as required by the contract. This view excludes 1,446 pages for abstracting that statute.

Two thousand, three hundred and fifty-five pages of the abstract contained minutes of the St. Francis Levee Board, and 994 contained delinquent lists returned by the collectors of the levee board. These pages were excluded by the master, but reinstated by the chancellor. These matters should not have been included in the abstract, except such as directly affected the title to lands sold for levee taxes. Under the statute authorizing sales for levee taxes in that district, the lien for assessments is enforced by foreclosure proceedings in the chancery court in the nature of proceedings *in rem*, and the foreclosure decrees are conclusive of all matters adjudicated therein. The minutes of the levee board and the delinquent lists cannot therefore directly affect the title to the lands, and they were improperly included in the abstract. Moreover, the findings of the master are presumptively correct, and it is not shown that these matters included in the abstract "affect vitally or historically the title to the lands traced therein."

We are of the opinion that plaintiff's contention as to what shall be construed to be a "transfer" is correct, and that the master erred in excluding the charge for 2,115 transfers. The contention is, for illustration, that the selection and approval of swamp lands, the patent to the State, the entry in the land office of the patent to individuals, all appearing at different times and in different records, each constitutes a separate transfer within the meaning of the contract. Also, that a contract to convey, followed by deed pursuant to the contract, each constitutes a separate transfer. The contention of the defendant is that all such transactions are successive steps in one transfer, and constitute but a single transfer. Undisputed testimony was adduced by plaintiff showing that among abstracters each of such items is treated as a separate transfer, and usually embraced in an abstract separately. We conclude that that is the correct interpretation of the contract.

Four thousand, seven hundred and eighty-six pages were included in the abstract under the head of "Tax Forfeitures," for transcribing county court records, assessment books, tax books, notices of sale and certificates of redemption. In addition to that, collectors' certificates of delinquencies and clerks' certificates of forfeitures were included, and these were allowed by the master. The words "tax forfeitures" in the con-

tract are very indefinite. Plaintiff McVeigh prepared the contract, and it is his own language, and must be construed in its most limited sense against him. It does not include all antecedent steps with relation to the assessment of taxes.

The abstracter charged for transcribing the tax deeds by the page, and not as a transfer. This added 456 pages to the abstract. Section one of the contract fixed the rate of compensation, and, according to the terms of that section, instruments which purported to transfer title were to be charged for as transfers, regardless of the number of pages taken up in setting them forth. The third section of the contract requires the abstracter to transcribe tax deeds in full, but that does not enlarge the rate of compensation prescribed in the preceding section. That charge for additional pages was properly excluded.

The abstracter included overdue tax proceedings, covering 7,664 pages of the abstract. The master deducted 4,441 pages. His report shows that he went through the abstract carefully and eliminated copies of records which do not affect the title to the lands. As far as these matters are brought to our attention, we conclude that he was correct in his findings. It is insisted, however, that the contract called for copying "all decrees, orders of court or documents on file of whatever nature." We do not so construe the contract. It called only for such records as "vitally and historically" affected the title to the lands mentioned in the abstract.

The chancellor was correct in refusing to charge plaintiff with the extra expense of correcting inaccuracies of the abstract. They were mainly unimportant, and, as soon as the attention of the abstracter was called thereto, he offered, and still offers, to make the necessary corrections.

Plaintiff is entitled to interest at legal rate on the amounts found to be due under the contract.

Conformable to the views herein expressed, the account is stated as follows:

Number of pages furnished by abstracter.....	34,725
Deduct	Pages
Transcribing Swamp Land Act.....	610
Transcribing Curative Acts.....	912
Transcribing Internal Improvement Act.....	32

Transcribing Donation Act.....	89
Abstracting St. Francis Levee District Act.....	1,446
Transcribing Minutes Levee Board.....	3,289
Transcribing Tax Forfeitures.....	4,786
Transcribing Tax Deeds.....	456
Transcribing Overdue Tax Items.....	4,441
	<hr/> 16,061

Total number of pages to be paid for..... 18,664
Amounts.

18,664 pages at 66 2-3 cents each.....	\$12,443.00
Discount 7½ per cent.....	\$ 933.22
Amount advanced	9,539.55
	<hr/> \$10,472.77

\$ 1,970.23

The decree of the chancellor is therefore reversed, and a decree is entered here in favor of plaintiff for the sum of \$1,970.23, with interest from May 17, 1906.

It is so ordered.

ARKANSAS AMUSEMENT ASSOCIATION v. HIGGINS.

Opinion delivered November 21, 1910.

CORPORATION—LIABILITY.—Where a corporation permits its manager to operate a business in its name, and receives the benefits and enjoys the fruit of such business, it will be liable for debts incurred by the manager for the benefit of such business.

Appeal from Garland Circuit Court; *W. H. Evans*, Judge; affirmed.

E. W. Rector, for appellant.

Appellant is not liable because (1) the proof shows that R. G. Daniels bought and owned the Majestic Theater individually; (2) that he did not contract this debt in the name of the appellant; (3) it does not show that the by-laws or minutes of the corporation gave him any authority to purchase and

operate theaters for appellant, or (4) that it held him out as having such authority. 62 Ark. 42.

Calvin T. Cotham, for appellee.

1. The defense of want of authority on the part of the agent should have been pleaded in the lower court. This is a defense which must be specifically pleaded and proved. 80 Ark. 65; 10 Cyc. 1156; 6 Thompson, Corp. § § 7617, 7619 and cases cited.

2. Power to issue negotiable paper does not arise in this case, and 62 Ark. 42, relied on by appellant does not apply. The work which appellee had done was within not only the apparent, but also the actual scope of his authority. 10 Cyc. 903, 905, 909-10; 62 Ark. 7; 67 Ark. 542; Mecham on Agency, § § 280, 281, 282, 283.

McCULLOCH, C. J. This is an action instituted by Henry Higgins, who is a carpenter, against defendant, the Arkansas Amusement Association, on account for \$216.46, alleged to be due plaintiff for work done about a building in the city of Hot Springs, known as the Majestic Theater. Plaintiff recovered judgment below, and defendant appeals. The only contention made in the argument here is that the testimony is insufficient to sustain the verdict.

Defendant is a domestic corporation, organized for the purpose of operating places of amusement, such as moving picture shows and vaudeville theaters. R. G. Daniels was president of the corporation, and managed the business, being held out upon the printed literature as president and general manager, and as such operated two places of amusement in Hot Springs, one known as the Orpheum Theater, and the other as the Lyceum Theater. The general office of the company was maintained in one of the office buildings in the city, with a sign displayed showing Daniels to be general manager. The operation and management of the Majestic Theater was also taken over, and Daniels employed plaintiff Higgins to do a lot of work in and about the building. He had previously done work at the instance of Daniels at the Orpheum Theater, which had been paid for by defendant company. The evidence is clear that the Majestic Theater was operated in the name of the defendant company, and all the printed literature, such as programs, tickets,

etc., contained the name of the defendant association. The door receipts during the time the theater was operated were taken to the general office of the company and there mingled with its funds.

We are of the opinion that this proof warranted the jury in finding that the defendant had permitted itself to be held out as the owner and operator of the Majestic Theater, and that Daniels was its general manager, with authority to do all that was necessary in conducting the business undertaken. The evidence warrants the conclusion that all the other stockholders knew, or should have known, that Daniels was operating the Majestic Theater in the name of the company, though it is claimed now, and testimony was introduced tending to show, that in fact the Majestic Theater was a private enterprise of Daniels himself.

With the facts thus found, it needs no citation of authority to show that the corporation is liable for debts incurred by Daniels under those circumstances. The company not only permitted Daniels to conduct the business in its name, but it also received the benefits and enjoyed the fruits of the enterprise. Therefore, it was responsible for the debts incurred.

There was also evidence sufficient to sustain the attachment issued in the cause.

Judgment affirmed.

NATIONAL ANNUITY ASSOCIATION v. CARTER.

Opinion delivered November 21, 1910.

1. LIFE INSURANCE—FRAUD AS DEFENSE.—Where a policy of life insurance or mutual benefit certificate provides that "the benefits herein shall be incontestable from this date," the insurer is precluded from setting up that the insured made answers to questions propounded to him in the application for insurance that were knowingly false and made to defraud the insurer. (Page 498.)
2. SAME—EFFECT OF MISREPRESENTATIONS.—Representations made by the insured as a basis upon which the contract is entered into will not invalidate the contract because they are untrue unless they are material to the risks, and it is sufficient if they be substantially true. (Page 499.)

3. SAME—EFFECT OF ONE COMPANY ASSUMING ANOTHER'S LIABILITIES.—Where one fraternal association assumed the obligations of another association, the extent of the liability of the former to the latter association's policy holder will depend upon the terms of the latter's policy or benefit certificate. (Page 499.)

Appeal from Lawrence Circuit Court, Eastern District;
Charles Coffin, Judge; affirmed.

Smith & Blackford, for appellant.

1. The answers of deceased to questions propounded to him with reference to his habits as to drinking intoxicants being false, and knowingly and wilfully so, as appears by the proof, he thereby perpetrated a fraud, and the certificate issued to him and the assumption of risk by the insurer, were void *ab initio*, and this fraud was material to the risk. 58 Ark. 529, 532, 535, 540, 544 and cases there cited; 72 Ark. 621, 623; 66 L. R. A. 322, 334. See also 37 Ark. 580; 52 Ark. 517; 53 Ark. 381; 100 Mass. 472.

2. If appellant is liable at all for any amount, there should be deducted from the liability apparent upon the face of the certificate the difference between the amount of premium paid and the full amount of premiums that would have accrued and been paid for ten years had the insured lived, as provided by section 84, constitution and by-laws of appellant. 81 Ark. 512.

W. A. Cunningham, for appellant; *J. N. Beakley*, of counsel.

1. In the benefit sued upon appears this statement, "The benefits herein shall be incontestable from this date." The constitution and by-laws of the Loyal Fraternal Home provides, section 20, "Certificate incontestable—Benefit certificates shall be incontestable from the time they are put in force, *except for non-payment of dues and assessments.*" 115 N. C. 393; 104 Ga. 256; 62 Minn. 39; 101 Tenn. 22; 42 L. R. A. 247; 29 Cyc. 198.

2. This court will give to the evidence supporting the contention of the appellee its strongest probative force; and if found to be legally sufficient to support the verdict, the verdict will be sustained. 89 Ark. 589; 76 Ark. 522.

3. This court will not reverse because of the giving of an abstract instruction unless the jury were misled or the appellant was prejudiced thereby. The jury are the judges of the weight and preponderance of the evidence. 22 Ark. 207;

Id. 216; 37 Ark. 238; 49 Ark. 381; 85 Ark. 577; 37 Ark. 185; 50 Ark. 484; 51 Ark. 467.

McCULLOCH, C. J. This is an action instituted by the beneficiaries to recover on a benefit certificate issued by the Loyal Fraternal Home, a corporation engaged in the life insurance business on the fraternal plan, to Antonio Frankring, one of its members, now deceased. The certificate is in the following form:

"This certifies that Antone Frankring is a member of the Loyal Fraternal Home Lodge No. 92, at Walnut Ridge, State of Arkansas, and within ninety days after receipt of satisfactory proofs of his death there shall be paid to ----- one thousand dollars. The conditions, benefits and provisions printed or written by the society on the back hereof are a part of this certificate. The benefits herein shall be incontestable from this date. In witness whereof the Loyal Fraternal Home has caused its corporate seal to be hereunto affixed and these presents to be signed by its supreme president and its supreme secretary at Cameron, Mo., this the 25th day of September, 1907."

On December 27, 1907, defendant National Annuity Association, another corporation engaged in the same business, took over and assumed the obligations of the other association to its members by a writing in the following form:

"The National Annuity Association, a fraternal beneficiary association at Kansas City, Mo., hereby assumes the benefit certificate issued by the Loyal Fraternal Home, of Cameron, Mo., as above described, to which this certificate of assumption is attached, and by these presents makes it a certificate of the National Annuity Association, subject to the constitution and laws of the said National Annuity Association now in force or that may be hereafter adopted. Provided, however, the National Annuity Association agrees to pay the full benefit provided for in this certificate at death, less amounts previously paid for disability benefits and unpaid assessments, whether such benefit is provided for under its laws or not."

Frankring died January 7, 1909, and the action is against the National Annuity Association. No question is raised as to the authority of the defendant under its charter powers to

take over the business or to assume the obligations of the other association. Defendant pleaded, among other defenses, that the assured, in order to procure the insurance, had knowingly made false answers to certain questions propounded in the application, for the purpose of deceiving and defrauding the insurer, which said false answers were relied on by the insurer. Said questions and answers are set forth as follows: "Do you use alcohol or malt liquors at all?" "Do you drink daily?" "Did you ever drink to intoxication or excess?" To all of which questions assured answered "No." Also the following questions: "What illness, disease or accident have you had since childhood?" Answered: "Attack of pneumonia in 1893 of one week's duration, mild attack, and had completely recovered." "Have you had any sickness, ailment or injury that has not been named or described above?" Answered: "No." "Who was the last physician who attended or prescribed for you?" Answered: "Johnson Patrick, Jonesboro, Ark., 1893, for pneumonia."

There was evidence adduced by the defendant tending to show that Frankring drank intoxicating liquors to great excess for several years prior to his application for insurance, and was frequently intoxicated. But, on the other hand, the testimony adduced by plaintiff tended to show that Frankring drank only occasionally, and not to such excess as to materially affect his health or strength. There was also testimony to show that Frankring went to a hospital in St. Louis during the year 1907, prior to his application; but it does not show that his ailment was of such a serious nature as to materially affect his health or longevity.

It will be noted in the outset that it is not pleaded that the truth of the said answers was warranted by the assured, or that there was any breach of warranty. The defense relied on is that the said answers to questions were "knowingly false and made for the purpose of deceiving and defrauding this defendant." Even if such defense had been pleaded, it would have been of no avail, for the language of the contract would defeat such a defense, as it declares that "the benefits herein shall be incontestable from this date." Any stipulation in the application making the liability of the insurer depend on a

warranty of the truth of answers to questions would be inconsistent with the terms of the benefit certificate, which is the last expression between the parties of the terms of the contract. The distinction between warranties and representations is a marked one. "Representations," said Judge BATTLE in delivering the opinion in *Providence Life Assurance Society v. Reutlinger*, 58 Ark. 528, "are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer at or before the contract is entered into, they form a basis upon which the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contract because they are untrue, unless they are material to the risks, and need only be substantially true. They render the policy void on the ground of fraud, while a noncompliance with a warranty operates as an express breach of the contract." See also 2 Cooley's Briefs on the Law of Insurance, p. 1162.

The instructions of the court were in conformity with this well marked distinction, and correctly submitted the question whether or not the alleged false representations were material to the risk.

Error of the court is assigned in refusing to submit to the jury the question of reduction of the amount of liability under a section of the by-laws of the defendant association reading as follows: "Section 84. In the event of the maturity by death or disability of a certificate in this association, before the member has contributed ten years' assessments, the unpaid assessments will be charged against the certificate and deducted from the final payments. This section shall not apply to an increasing life certificate until after it has been in force three years."

It is not shown that the constitution or by-laws of the Loyal Fraternal Home, the original insurer, contained any such provision, and it was the contract made by that association which the defendant assumed. Defendant, by its contract assuming the contract of the Loyal Fraternal Home, expressly agreed "to pay the full benefit provided for in this certificate at death, less amounts previously paid for disability benefits, and unpaid assessments, whether such benefit is provided for under its laws

or not." The certificate provided for the payment of one thousand dollars, and nothing could be deducted under the contract with defendant except "amounts previously paid for disability benefits, and unpaid assessments," and none are shown to be deducted.

Judgment affirmed.

ALLEGHENY IMPROVEMENT COMPANY v. WEIR.

Opinion delivered November 21, 1910.

1. EVIDENCE—SUFFICIENCY.—The jury may not disregard undisputed evidence in a case. (Page 504.)
2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where plaintiff and two fellow servants were engaged under directions of their foreman, in dipping gasoline from a pail and throwing it upon the walls of their caboose, and plaintiff was injured in an explosion which ensued, he cannot recover upon the ground that the method of handling the gasoline was negligent because, if it was, he was guilty of contributory negligence. (Page 504.)
3. SAME—PRESUMPTION OF NEGLIGENCE.—The fact that a servant was injured in a gasoline explosion raises no presumption that the master was guilty of negligence. (Page 504.)
4. APPEAL AND ERROR—TREATING COMPLAINT AS AMENDED.—The complaint will not be treated on appeal as amended to conform to the proof where the cause was not so treated by the trial court. (Page 504.)
5. NEGLIGENCE—USE OF GASOLINE.—It is not negligence *per se* to direct a servant to use gasoline, since it is harmless when used with care. (Page 505.)
6. MASTER AND SERVANT—FAILURE TO WARN.—A servant cannot complain that his master failed to warn him as to the danger of using gasoline if he was already possessed of that knowledge. (Page 505.)

Appeal from Carroll Circuit Court, Eastern District; J. S. Maples, Judge; reversed.

W. B. Smith, and J. Merrick Moore, for appellant.

1. Negligence is but an inference or conclusion drawn from facts alleged and proved, and a complaint should contain, not conclusions or inferences of law, but a statement, concise in form, from which they are drawn. 41 Mich. 435; 66 N. W. 842; 10 Minn. 151; 26 Pac. 560; 41 Atl. (N. J.) 710; 43

Atl. (R. I.) 536; 14 Enc. Pl. & Pr. 335; *Id.* 336. A motion to make more definite and certain would have been the proper method of reaching defects in the complaint in the case at bar. 40 Ark. 277; 53 Ark. 453; 66 Ark. 280; 70 Ark. 161; 73 Ark. 8; 77 Ark. 607; 75 Ark. 369.

2. The evidence does not sustain the verdict. 71 Ark. 518.

3. By his own evidence appellee shows that he was aware of the risks ordinarily incident to the use of gasoline as used at the time of the accident, and the burden of proof was upon him to show that the explosion was the result of some risk or danger which was not or should not have been known by him; otherwise he assumed the risk. 68 Ark. 316; 77 Ark. 367; 41 Ark. 382; 63 Ark. 181; 70 Ark. 143; 74 Ark. 22; 77 Ark. 22.

Festus O. Butt, for appellee.

1. If it be conceded that there was a defect in the complaint, that defect was cured by the verdict. 31 Cyc. 776 and cases cited; 109 Mo. 64, 18 S. W. 1149; 28 N. E. (Mass.) 352; 130 Mo. 657; 50 N. W. 989.

2. The evidence supports the verdict, if it supports a finding that the master furnished the servant with a dangerous appliance for his work, of the dangerous character of which in the manner used he was ignorant, and of which it failed to give him warning; and, such being the case, the risk was not assumed. 109 Mo. 64; 89 Ark. 424.

3. The doctrine *res ipsa loquitur* applies where the injury is of such nature that it could not well have happened without the master being negligent, or where it is caused by something connected with the equipment or operation of the road over which the company has entire control. 75 Ark. 479; 207 Mo. 480. Under such circumstances the burden is upon the defendant, such an accident and due care on the part of the plaintiff being shown, to explain the occurrence of the accident, and show affirmatively its freedom from fault. 168 Pa. 497; 184 Pa. 519; 80 Md. 146; 164 Mass. 42. The mere fact that the accident was unusual or that a similar one may never have occurred before does not repel the charge of negligence. 144 Mass. 404; 39 N. Y. 227; 95 N. Y. 562; 38 U. S. 181; 101 U. S. 453.

McCULLOCH, C. J. In the year 1908 defendant, Allegheny Improvement Company, a foreign corporation, was doing construction work for the Missouri & North Arkansas Railroad Company in the northern part of this State, and the railroad company furnished to said defendant a train-crew of men to operate a steam ditcher in the prosecution of said construction work. The men composing the train-crew became, according to the contract, servants of defendant during the progress of this work, and were under the orders of Mr. Nicholas, defendant's general foreman. Plaintiff was a member of the crew, being a brakeman.

While they were at work at Arlberg, Ark., members of the train-crew slept in a caboose which, it appears, was infested with bedbugs. Early on the morning of Sunday, November 8, the men wanted to clean the caboose and rid it of the vermin. They (plaintiff, another brakeman named Liming and the conductor, Mr. Queen) procured two pails of gasoline from a pump house nearby, and proceeded to use it in the caboose by throwing it with cups on the walls and bunks. While doing this, an explosion occurred, and the plaintiff was severely burned, and sustained serious injuries. They had used in this way one of the pails of gasoline and about one-third of the other pail when the explosion occurred. The door and windows of the caboose were open at the time. Plaintiff was standing in the door at the time, and his companions, Queen and Liming, were just outside, having become sick from the gas arising from the oil which they had all three been engaged in throwing about the car. There was no fire in or about the car, and there is nothing in the testimony to account for the explosion. No one else was near, and these men all testify that they were not smoking and did nothing to produce the explosion except to throw the gasoline about the car.

The testimony is conflicting as to the responsibility for using gasoline. Plaintiff stated that Nicholas, the foreman, instructed them to get some gasoline and use it, but did not tell them how to use it. The other testified that when they were about to clean the caboose for their own convenience and comfort Nicholas merely suggested that it would be a good thing to use for the purpose of exterminating the bugs, and gave them permission to get some from the pump house.

Plaintiff instituted this action against defendant to recover compensation for his injuries, alleging in general terms that the explosion was caused by the negligence of his fellow-servants. The allegations of the complaint with respect to the alleged negligence are as follows: "That on the 8th day of November, 1908, this plaintiff at the said town of Arlberg was ordered by his superior employee in charge of the train aforesaid to clean out and drench the caboose aforesaid, and the bedding and appliances therein, with gasoline. That said superior employee, in charge of said train, brought and furnished plaintiff with the gasoline aforesaid, at the caboose aforesaid, for the purpose aforesaid, and, upon such order being received, it was the duty of plaintiff to comply therewith, which plaintiff then and there proceeded to do; that while so engaged, and while in the exercise of all reasonable care and prudence upon his part, and without any fault on the part of the plaintiff, the gasoline became ignited and exploded, through the negligence of the fellow-employees of this plaintiff in the employ of the defendants. That it was the duty of the defendants, in consideration of the services of plaintiff, to provide for him at all times a safe place and safe equipment to work, and that plaintiff believed, upon entering said employment, that such safe place and equipments would be provided, and believed, upon entering said employment, that it was safe for him to carry out the orders aforesaid in the use of said gasoline as aforesaid, and that plaintiff had no knowledge or notice that such use of gasoline was extra hazardous. That there was no fire at, in or near said caboose at the time of the commencement of plaintiff's said labor and in said caboose aforesaid; that plaintiff neither made nor created any; and only the plaintiff and other employees of defendants were at the time present, and that said explosion could not have occurred from natural causes, nor otherwise than by negligence on the part of defendants' employees present aforesaid."

Defendant filed a motion to require plaintiff to make the complaint more specific by setting forth in what particular said fellow-employees were negligent, and by stating why the explosion could not have occurred from natural causes. The court overruled the motion, and defendant excepted, and then

filed its answer, denying the allegations of negligence. It also pleaded contributory negligence on the part of plaintiff and assumption of risk. Trial before a jury resulted in a verdict for plaintiff, and judgment for \$1,000, and defendant appealed.

The first question to be disposed of on this appeal is whether there was evidence to sustain the contention that plaintiff's injury was caused by the negligence of his fellow-servants. If there was, the verdict is sustained, for under the act of 1907, the defendant is liable for such an injury if the plaintiff was himself in the exercise of due care for his own safety. We find no evidence at all in the record supporting the charge. As has already been shown in the statement of facts, all three of the persons present testified positively that there was no fire in the caboose at the time. No one was smoking, and none of them did anything to cause the gasoline or the gas arising therefrom to ignite. This is undisputed, and the jury had no right to disregard the undisputed testimony. All of the men were using the gasoline in precisely the same manner—dipping it from the pails with cups and throwing it over the walls of the car, the bunks, etc. So, if that constituted negligence, plaintiff was not in the exercise of due care, and cannot recover on account of his own contributory negligence. There is no presumption of negligence, but the burden was on the plaintiff to prove the acts of negligence on account of which he seeks to recover for his injuries. Negligence cannot be inferred merely from the happening of the injury. *Fordyce v. Key*, 74 Ark. 19; *St. Louis, I. M. & S. Ry. Co. v. Andrews*, 79 Ark. 437.

The mere fact that gasoline is an inflammable and explosive substance, and that plaintiff was injured by an explosion, does not afford ground for an inference that some person for whose acts defendant is responsible caused the explosion. Those things must be proved in order to justify a judgment for damages.

It is insisted, however, in support of the verdict, that the testimony warranted a finding of negligence on the part of defendant in directing the use of a dangerous substance like gasoline, and also in directing plaintiff and his fellow-servants to use the gasoline without warning him of the danger, and that, though these charges of negligence were not embraced in the

complaint, the pleadings should be considered as amended to conform to the proof. The case does not seem to have been submitted on either of those charges of negligence; therefore we cannot treat the pleadings as amended to conform thereto, nor can we treat that issue as settled by the verdict of the jury. But, even if we should so treat the issue, the verdict cannot be upheld on those charges. There is nothing to warrant a finding of negligence merely in using gasoline in the caboose. It is a commodity in common use for various purposes. It is a dangerous substance, but perfectly harmless when used with care. There being no fire in or about the caboose, it certainly did not constitute any negligence to direct three full grown men of ordinary intelligence to use it in exterminating bugs; and if there was any negligence in using the gasoline, under the circumstances of this case, it devolved on plaintiff to prove it. The matter cannot be left to mere conjecture, and form the basis of a verdict for damages.

Nor can plaintiff fare any better with the charge of negligence in failing to warn him of the dangers of using gasoline. He stated in his testimony that he knew gasoline as a highly inflammable explosive and dangerous substance. That being true, he needed no warning of danger, for the warning would have added nothing to the sum of his knowledge.

But, above all that, the weakness of plaintiff's case is that he fails to prove that it was dangerous to use gasoline in the particular manner in which it was used in this case, or that it constituted negligence to so use it. In this his whole case fails, and the verdict cannot be sustained.

For these reasons the judgment must be reversed, and the cause remanded for new trial, and it is so ordered.

DIERKS LUMBER & COAL COMPANY v. COFFMAN.

Opinion delivered November 21, 1910.

1. FRAUDS, STATUTE OF—WAIVER.—The statute of frauds cannot be availed of unless it was pleaded in the court below. (Page 510.)

2. AGENCY—HOW PROVED.—While the transactions and declarations of an agent are inadmissible to prove his agency as against his principal, the agent may testify that he is agent of the principal. (Page 510.)
3. SAME—UNAUTHORIZED ACT—RATIFICATION.—There is a distinction where a principal is notified of the unauthorized act of an agent and of a mere volunteer in this, that the principal's silence in the first instance will be deemed a ratification, while it will not be such in the second. (Page 510.)

Appeal from Howard Circuit Court; *James S. Steel*, Judge; affirmed.

Sain & Sain and *J. S. Kirkpatrick*, for appellant.

The agency of Campbell could not be established by proof of statements made by him to the effect that he was such agent. 31 Ark. 212; 33 Ark. 251.

W. C. Rodgers, for appellees.

1. It is undisputed that the supplies were furnished; that those furnished on the May payroll were sent to DeQueen, and were paid; that Mr. Dierks made no objection to the orders in dispute except that the two mills were "in the hole," and that amounts of these orders were deducted in the settlement between appellant and the hands.

There is no better way to interpret a contract than by the acts of the parties under it, and appellant, under these facts will not be heard to deny its liability. 46 Ark. 129; 52 Ark. 65; 55 Ark. 414; 78 Ark. 202; *Id.* 418; 80 Ark. 543; 130 S. W. (Ark.) 452; 91 Ark. 350.

2. Proof of Campbell's agency does not depend on his declarations. There is other evidence in the record of such agency. Moreover, there is no assignment in the motion for new trial of error in the manner of proving his agency. 23 Ark. 19; 91 Ark. 427; *Id.* 441; 73 Ark. 530; 77 Ark. 27; *Id.* 418; 67 Ark. 531; 70 Ark. 337; *Id.* 427.

The testimony tends to show that what he said appellant would do was done, and to establish the course of dealing contended for by appellees.

3. Appellant cannot avail itself of the statute of frauds by raising the question here for the first time. This statute cannot be relied on unless pleaded in the answer. 71 Ark. 302; 46 Ark. 96; 70 Ark. 558; 87 Ark. 443; 70 Ark. 558; 80 Ark. 391; 81 Ark. 476; 82 Ark. 260; 83 Ark. 574; 79 Ark. 53; 90 Ark. 469; 74 Ark. 72; 90 Ark. 531.

HART, J: This is an appeal by the Dierks Lumber & Coal Company, a corporation, from a judgment rendered against it in the Howard Circuit Court for \$281.07 in favor of Coffman Brothers, a partnership, composed of J. H. Coffman, D. D. Coffman and T. J. Coffman. The facts are substantially as follows:

Appellant owned a great quantity of timber situated in the northern part of Howard County. Appellant and one James Graves entered into a written contract whereby the latter agreed to erect a saw mill on the lands of the former, and saw its timber into lumber. The price to be paid for the sawing was fixed by the contract. Appellant was designated in the contract as the party of the first part, and James Graves as the party of the second part. Among other provisions, the contract contained the following:

"The party of the first part reserves the right to pay direct to all employees of the party of the second part who would be entitled to a lien on said lumber under the laws of the State of Arkansas all that may be due such employees, the balance to be paid direct to the party of the second part on or before the 10th day of the month following such grading, stacking and counting."

J. H. Coffman, one of the appellees, testified that his firm owned and operated a supply store at New Hope near the sites of said mills. That J. M. Campbell and H. L. McGehee stayed all night with him, and he asked them about letting the mill hands have supplies. McGehee was foreman at Moore's mill, and Coffman, in response to a question by the court as to whom Campbell was representing, answered that he was representing the appellant. Coffman further said: "He (Campbell) told me that they were responsible—that the Dierks people were responsible for all of the labor that was done at the mills, and I told him very well, or something of that kind, and went ahead, and when the foreman issued an order to the hands for the time, why we took these orders, and let them have goods, and turned the orders in to the office at De Queen, for the May payroll of 1908, I believe, to the best of my recollection, and they paid for all of the orders."

The May orders went into the office of appellant, and were promptly paid by it. The appellees then furnished supplies on

the June orders or time checks issued by the mill foreman, and these in turn were sent in to the appellant for payment, and payment was refused. The amount due on these orders is \$281, and represents the same kind of transaction as occurred on the supplies furnished in May.

The following is quoted from the testimony of J. H. Coffman:

"Q. Now, who did you contract with? A. As I told you a while ago, I spoke to Mr. Campbell there, and asked him about this matter. I seen how it was coming up, and he says we are responsible for all the time—we pay the labor of the hands, whether the mill man cuts anything or not, and that was about all. That was the most I recollect. Q. Mr. Campbell is with the Dierks Lumber Company, isn't he? A. Yes, sir. Q. Whom did you look to for payment? A. I look to the Dierks people. Q. Whose timber was it that they were sawing up, Mr. Coffman? They were sawing the timber of the Dierks Lumber and Coal Company, were they not? A. Yes, sir. Q. And these hands that were furnished supplies to were hands working at the mills of the defendant? A. Yes, sir."

H. L. McGehee testified as follows:

"Q. Do you know where the Moore mill was? That's in Howard County? A. Yes, sir. Q. What connection did you have with it? A. I was foreman. Q. Did you write any orders for the hands of that mill? A. Yes, sir. Q. To the defendants? A. Yes, sir; some to them. Q. Have the Dierks people sent you the money to pay Coffman? A. Yes, sir. Q. Now, Mr. McGehee, whose lumber were the Dierks people getting up there? A. Dierks'. Q. Where did that lumber go after it was cut? A. It went from there to Dierks—supposed to go there—but some is there yet, I think. Q. Was it more convenient to get supplies for the hands up there at New Hope or at Dierks? A. It was more convenient at New Hope. Q. Did Mr. Campbell say anything to you about furnishing these supplies at the time you took charge of the Moore mill? A. Why, all Mr. Campbell said to me was he instructed me not to give orders for any more time than the men had coming. Q. That had reference to the time for supplies? A. Yes, sir. Q. And of course you did not do so? A. No, sir."

Q. Mr. McGehee, do you know whether or not, in settling up with these men for their time, these orders for supplies were deducted out of their time? A. Yes, sir."

Owen Phillips and J. J. Coffman testified that they worked at the Moore mill, and that they bought supplies from appellees during this time; that McGehee would give them an order for the amount of time they had worked, and the amount due therefor, and they would take it and buy supplies from appellees with it; that in settling with them McGehee would only pay them for what was left after deducting these orders which had been given them with which to trade with appellees.

Will Wilson testified as follows in regard to the agency of Campbell:

"Q. Do you know Mr. Campbell? A. Yes, sir. Q. What connection has he with the Dierks people? A. He has been working for them quite a while in our country as agent. Q. Was he working there in 1908? A. Yes, sir."

J. H. Coffman, being recalled, again stated that, in talking with Campbell about the mill hands getting supplies from his firm, Campbell said they (meaning appellant) would be responsible for all the time the hands had coming. He further stated that, upon the refusal of appellant to pay the June orders, he went to see Herman Dierks, the head man of the company, and that Dierks told him that the reason that they had not paid appellees was that "the mills had gone in the hole." That he did not say anything about the authority of the mill people to issue the time checks.

J. M. Campbell testified that he was working for the Choc-taw Lumber Company. He denied that he had any conversation with Coffman about supplying the mill hands. He stated that he and Graves were the only persons present when the contract with him was made, and that the Moore contract was similar to that of Graves.

It is apparent that appellant is liable if Campbell had authority to make the contract which is the basis of this suit. While Campbell denies having made a contract with appellees that appellant would be responsible for or pay for the supplies furnished the mill hands to the amount of wages of the hands, Coffman testifies positively that such contract was made, and

the jury has settled the disputed question of fact in favor of appellees, and the verdict is conclusive upon us.

It is first contended by counsel for appellant that appellee's claim is within the statute of frauds; but, even if that defense could have availed appellant, it was not made in the trial court, and the statute of frauds can not be availed of unless pleaded. *St. Louis, I. M. & S. Ry. Co. v. Hall*, 71 Ark. 302.

It is next contended by them that Campbell had no authority to make such contract, and this is the most serious question in the case.

While it is the settled law, as contended by counsel for appellant, that the transactions and declarations of an agent are not of themselves evidence of his agency as against the principal, the agent may testify as to the fact that he is the agent of the principal, just as he may testify about any other fact of which he has affirmative knowledge. It is true that Campbell testified that at the date of the trial he was employed by the Choctaw Lumber Company; but he also stated that he and Graves were the only persons present when the contract was made with the latter to erect the mill and manufacture the timber of the former into lumber; and that the contract of appellant with Moore was similar to that made with Graves. From this the jury might have inferred that he acted as the agent of appellant in making these contracts.

It is shown by other independent evidence that Campbell was the agent of appellant during the whole period of time covered by the transactions in question. While the evidence does not establish the fact that he had authority to make the contract in question in this case, it does show that he had been representing the appellant for several years, and had performed numerous services for it as agent; and was acting as its agent during the period of time covered by the transactions involved in this suit.

As we have already seen, there was sufficient testimony to show that he did make the contract in question, and the jury by its verdict so found. This brings us to the question of whether his action in making the contract was ratified by the principal.

"In considering whether the facts and circumstances of a particular case are sufficient evidence of a ratification, the dis-

tion has been made between the unauthorized act of an agent where the relation of principal and agent already exists, and that of a mere volunteer or stranger. In the former case, it is said that an intention to ratify will always be presumed from the silence of the principal after being informed of what has been done on his account, while in the latter case it has been said there exists no obligation to repudiate the transaction, nor will silence be construed into a ratification." *Heyn v. O'Hagen*, 60 Mich. 150. See also Story on Agency, § § 255, 258; *Gold Mining Co. v. National Bank*, 96 U. S. 640; Clark & Skyles on the Law of Agency, § § 110 and 136.

It will be noted that appellant in its contract with Moore and Graves reserved the right to pay direct all the mill employees, and that for the month of May it elected to do so. At the end of the month the foreman at the mills sent in to the office of appellant a statement of the time worked by each man and the amount due him, and from this statement of the total amount due was deducted the amount of the time checks which had been given the employees during the course of the month, and which had been used by them in purchasing supplies from appellees. The balance due the employees as shown by this statement was sent to the foreman and by him paid to the employees.

The amount of the time orders used by the employees in buying goods from appellees were sent by appellees to the office of appellant, and was promptly paid by it. From these circumstances it might be inferred that appellant had knowledge that some of its agents had made arrangements with appellees to furnish supplies to the mill employees on these time checks or orders and to send them in to appellant to be paid. Otherwise why should they have been presented to appellant for payment? These facts and circumstances operate as presumptive proof that appellant had knowledge of what had been done on its account, and that some of its agents were assuming to act for it in the matter. Appellant knew that its silence and failure to repudiate the acts of its assumed agents would be likely to cause injury to appellees as persons giving credit to the mill employees and to induce them to believe that appellant's agents, assuming to act for it in the matter, had authority to do so. Hence we conclude that there is sufficient evidence to support the verdict.

While complaint is made of the instruction given by the court upon this theory of the case, we believe that the court in the instruction complained of had in view the law as we have declared it, and that the instruction was not erroneous. Its language might have been couched in plainer terms, but this defect was one of form, and not of substance, and should have been met by specific objection.

The judgment will be affirmed.

MORGAN v. McCUIN.

Opinion delivered November 21, 1910.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts is conclusive on appeal unless it is clearly against the weight of the evidence. (Page 518.)
2. ADVERSE POSSESSION—RETENTION OF POSSESSION BY GRANTOR.—Where a grantor, after having executed a deed, remains for a short time in possession of a portion of the premises conveyed, he is presumed to hold in subordination to the title conveyed unless there is evidence of a contrary intention. (Page 519.)

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a suit in chancery commenced on the 12th day of August, 1909, by D. E. Morgan against E. J. McCuin, Mrs. N. McCuin and Neely Burton. The purpose of the action was to reform a certain deed executed by Morgan to Burton, and to recover possession of the land in controversy. E. J. McCuin claimed no title to the property, and the suit was discontinued as to him. The defendant Burton failed to answer, plead or demur, but made default. The defendant Mrs. McCuin answered, denying the allegations of the complaint and setting up title in herself to the lands in controversy. The facts, so far as they are material to a decision of the rights of the parties, are as follows:

On the 1st day of January, 1902, John Hill and Mary Hill, his wife, by warranty deed, conveyed to the plaintiff, D. E.

Morgan, the following described lands situated in the town of El Dorado, in Union County, Arkansas, towit:

Beginning at a point 60 feet due south of the southwest corner of block 21, shown on the plat of the town of El Dorado, Arkansas, thence south to right-of-way of the St. Louis, Iron Mountain & Southern Railway Company, thence in a north-easterly direction with said right-of-way to the western boundary of Jackson Avenue, thence north to a point 60 feet due south of the southeast corner of said block 21, thence west about 200 feet to the place of beginning.

On September 21, 1903, D. E. Morgan conveyed by warranty deed to Neely Burton a part of said lands. The description of said lands as contained in the deed are as follows:

"A strip or parcel of land in block 40 as shown on the town plat of El Dorado, Arkansas, and described by metes and bounds as follows: Beginning 228 feet south of the southwest corner of block 21, as a starting point on Hill Avenue, and running south along east Hill Avenue 49 feet to the right-of-way of railroad; commencing again at above starting point of this tract, and running east 60 feet to a stob, thence in a southwest direction with the right-of-way until this line intersects with the west line of this about 70 feet."

On September 22, 1903, Neely Burton conveyed the land to L. K. McKenney by deed containing the same description. On the 31st day of December, 1906, McKenney conveyed the land by the same description to J. R. Elder, who in turn re-conveyed to Neely Burton. On the 14th day of March, 1908, Neely Burton conveyed the same land by deed containing the same description to Mrs. N. McCuin. The consideration named in the deed was \$600, and the receipt of it was acknowledged.

Neely Burton testified that when he purchased the land from D. E. Morgan he only purchased the land outside of the inclosure, and that he did not know that a mistake had been made in the description of the land in the deed; that he never bought the land that was north of the fence, which he says was the boundary line between him and Morgan. In response to a question, he stated that if he had known about the mistake and could have done so he would have taken all the land his deed called for.

D. E. Morgan testified for himself, and said that when he sold to Neely Burton a part of the land was inclosed, and that he intended to sell and did sell to Burton only that part of it that was uninclosed; that, in order to obtain a correct description of the land to be conveyed to Burton, he had the part sold to him surveyed; that there was a house situated on the land conveyed to Burton, and that it was situated on the northwest corner of the land sold to him; that he supposed the southwest corner of the graveyard fence was the southwest corner of block 21, and he caused a line to be run from said corner to the northwest corner of Burton's house for a beginning point to be used in the description of the land in the deed from himself to Burton; that it afterwards turned out that the southwest corner of the graveyard was several feet south of the southwest corner of block 21. Morgan further testified that some weeks before Mrs. McCuin purchased from Neely Burton she and her husband approached him with a view of purchasing the land which he still owned; that they went on the land, and that he pointed out the fence between his land and Burton's as the boundary line between them; that when he first sold to Burton the fence between them was right up against Burton's house, and that he moved it three feet further north in order to obtain a passage way. Morgan further testified that, after Mrs. McCuin purchased the land from Burton, she had a survey made of the same, and from this survey, made in accordance with the description contained in the deed from Burton to Mrs. McCuin, it was found that the north boundary line was 15 feet north of and beyond his fence line; that Mrs. McCuin tore down the fence between them and set it on the boundary line as surveyed by her; that he noticed that his fence had been torn down and moved back; that he asked Mr. McCuin why he had done that, and McCuin replied that their lot went to that point, and that he replied that it did not; that McCuin said that their deed called for the land, and that they were going to have it; that he told McCuin that he would not stand that, and notified him not to put a house he contemplated building on the disputed strip; that this occurred in the spring or summer of 1908; that he went to see his lawyer at once, and told him that McCuin was going to build a hotel partly on his land, and directed him

to institute suit at once to stop it; that his attorney informed him that it was not necessary to institute the suit at once; that he had no further conversation with the McCuins about the matter, and that they subsequently erected a hotel, about 15 feet of which was placed on this land claimed by him; that, after the erection of this hotel, he brought this suit for the purpose of reforming his said deed to Neely Burton and of obtaining possession of the disputed strip of land upon which the hotel was partly erected.

A. J. McCuin was the agent of his wife in the purchase of the land from Burton, and denied that he had any knowledge of any mistake having been made in the description of the land until this suit was brought; that when he purchased the land and when the purchase price was paid, he thought he was purchasing for his wife the land described in the deed; that, after the deed had been executed and the purchase price paid, they had the land surveyed preparatory to building a hotel on it; that when it was ascertained that the north boundary line was 15 feet north of and beyond the fence, which had been built by Morgan, he tore down the fence and removed it to the boundary line as established by the survey; that before the survey was made he notified Morgan personally of that fact, and that Morgan promised to be present when the survey was made; that Morgan came along after the survey had been made and after the fence had been removed, and said that the survey was wrong, and claimed that a part of his land was being taken by the survey; that he told Morgan that he could have the line resurveyed if he thought it was wrong, and told him that he wanted the line established so that he could build a hotel; that this conversation occurred in June, 1908, and Morgan went away and never had any further conversation with him in regard to the matter; that Morgan never had the land resurveyed, and in October, 1908, the erection of the hotel was commenced, and that it was finished about the first of the following February; that Morgan knew that the hotel was being partly erected on the strip claimed by him, and did not make any objection on that account.

McCuin admitted that he spoke to Morgan about buying his land prior to the time he purchased the land from Burton

for his wife; but denied that Morgan told him that he owned all the land in the inclosure, or that he told him that the fence was the boundary line between him and Burton.

Mrs. N. McCuin testified for herself, and admitted that A. J. McCuin was her agent in the purchase of the property. She denied that she had ever been notified, or that she had ever heard that a mistake in the description of the property sold in the deed from R. E. Morgan to Neely Burton was claimed to have been made until this suit was brought. She admitted that she had been in El Dorado in February before the land was bought from Burton, and that at that time she looked at Morgan's property adjacent to it, but states that she never went on it, but merely looked at it in a general way as she walked down the street by it; that she paid \$600 to Neely Burton for the land at the time she purchased it and received a deed therefor.

Joseph Miller testified that he was present when Morgan showed McCuin his land, which was adjacent to the Burton tract. When asked if Morgan pointed out the land he then owned, said: "Only in a general way"; and further stated that he thought the land was inclosed; that he acted as agent for the McCuins in purchasing the land from Burton, and he thought he was buying the property that was described in the deed, and did not know that there was a mistake in the description of the land in the deed; that Mr McCuin had previously talked with Burton about purchasing the property, and that he was acting under his instructions.

The chancellor found the facts and the law generally for the defendant Mrs. N. McCuin.

The decree was therefore entered dismissing the complaint for want of equity, and the plaintiff has duly prosecuted an appeal to this court.

J. B. Moore, for appellant.

1. The proof is clear, unequivocal and decisive that the description incorporated in the deed from appellant to Burton was intended by appellant to describe the specific uninclosed lot sold by him to Burton, and that the latter so understood and accepted the same. By reason of this mutual mistake in the description, the deed should be reformed, unless appellee was an innocent purchaser. 51 Ark. 390; 37 Ark. 626.

2. Under the allegations of the complaint, not denied by the answer, and the allegations of said answer, appellee in effect admitted that she was not an innocent purchaser. Appellant's actual possession of the land was notice to appellee of his rights and equities therein. 54 Ark. 273; 76 Ark. 25; 55 Ark. 318; 77 Ark. 309; 82 Ark. 455; 71 Ark. 31; 66 Ark. 167; 92 Ark. 321. Appellee and her agents admit not only various facts and circumstances sufficient to put a person of ordinary intelligence upon inquiry, but also that they knew at the time of appellant's possession and claim of ownership. 51 Ark. 390; 37 Ark. 626; 77 Ark. 309; 71 Ark. 31.

3. Appellant is not estopped to claim the improvements placed by appellee on the land in controversy. The evidence clearly shows that she and her husband built with full knowledge of appellant's rights and equities. The burden of proof was on appellee to sustain her plea—that she was actually deceived by appellant's conduct and that he intended that she should act upon it. 54 Ark. 509.

4. Appellant was not guilty of laches. Kirby's Dig. § 5056; 75 Ark. 382.

G. W. Hendricks, for appellee.

1. Appellant was guilty of laches in waiting sixteen months to bring his suit when, under the circumstances, he should have acted promptly. 15 Ark. 296; 46 Ark. 348; 93 U. S. 62; 5 Wait, Actions and Defenses, 511; Kerr on Fraud and Mistake, 804; 48 N. Y. 200; 51 How. (N. Y.) 69; 9 Hare (Eng. Ch. Cases) 622; 9 Gill (Md.) 420; 5 R. I. 130; 89 Ind. 40; 53 Ind. 560; 58 Ind. 194; 31 Ind. 13; 135 Ill. 239; 34 Cyc. 966; 158 U. S. 417.

2. The mistake of which appellant complains is due to his own carelessness. The property is located in the county seat, where the records are kept and the surveyor resides, yet appellant, when he made the deed to Burton in which the alleged mistake occurred, failed to search the records or to call upon the surveyor to verify the description of the land. 93 U. S. 63; Kerr on Fraud and Mistake, 407; 70 Ark. 512; 89 Ark. 315; 20 Am. & Eng. Enc. of L. 714; 1 Story, Eq. Jur. § 146; Pomeroy's Eq. Jur. § 839; 47 Ark. 335; 75 Ark. 272; 42 Ark. 370; 57 W. Va. 125; 49 S. E. 936; 4 Sawyer 447; 34 Cyc. 948

3. Before appellant could maintain a suit for reformation, he should be in position to place appellee *in statu quo* with reference to the improvements made. That, under the circumstances of this case, would be impossible. 93 U. S. 62; 15 Ark. 290; 17 Ark. 238.

4. Appellee was a *bona fide* purchaser for value, without notice of any mistake.

HART, J., (after stating the facts). Under the undisputed facts of this case, the plaintiff was entitled to a reformation of the deed as against Neely Burton to correct the mistake made in the description contained in the deed from Morgan to Burton. But, in order to affect the rights of Mrs. McCuin, other questions arise.

Was she a *bona fide* purchaser for value without notice of the equities of the plaintiff, Morgan? It is insisted by the plaintiff that he informed Mr. McCuin, the husband and agent of Mrs. McCuin, before she made the purchase from Burton, that he claimed the strip of land in dispute, and that he pointed out to McCuin the fence adjacent to and north of the land then owned by Burton as his boundary line. McCuin denies this, and both he and his wife say they had no knowledge that any mistake had been made, or was claimed to have been made, in the description of the land in the deed of Morgan to Burton; and stated that they did not know that Morgan claimed the land in dispute until after they had received the deed to the same and had paid the purchase money, which was \$600. Joseph Miller testified that Morgan had shown his land to Mr. McCuin with a view of selling same to him; that this was prior to the time Mrs. McCuin purchased the land from Burton, but he says that Morgan only pointed out his land in a general way.

The chancellor made a general finding for the defendant, Mrs. McCuin, and this amounts to a finding by him that under the evidence as disclosed by the record Mrs. McCuin did not have actual notice of the equities of the plaintiff at the time she purchased the land from Burton and paid for the same; and also that she was a *bona fide* purchaser for value. The rule is firmly established in this State by an unbroken line of decisions that the finding of fact by a chancellor will not be disturbed on appeal unless it is clearly against the weight of evidence. When tested by this rule, it appears to us from a careful con-

sideration of the evidence that the finding of the chancellor in the respect just discussed must be sustained.

It is next insisted by counsel for plaintiff that plaintiff was in the actual and visible possession of the land in dispute at the time of the purchase of the defendant McCuin from Neely Burton, and that such possession was equivalent to actual notice of plaintiff's rights or equities. The case of *Thalheimer v. Lockhart*, 76 Ark. 25, and others of like character are cited by him to maintain his position. While the principle in those cases is well settled, and has often been recognized by this court, it has no application to a state of facts like that presented in this record. In the *Thalheimer-Lockhart* case one Smith had sold 40 acres of land to Lockhart, and a smaller number of acres was described in the deed to him. Lockhart, however, took possession of all the lands that was sold him, and remained in possession of the same. Subsequently Smith sold to Thalheimer a larger tract of land, and the description in the deed to him contained a part of the land previously sold to Lockhart. The court held that Thalheimer could not recover against Lockhart because Lockhart was in the actual, open and visible possession of the land when Thalheimer purchased it, and that this was notice to Thalheimer of Lockhart's rights. Thalheimer and Lockhart were strangers in title, and for that reason, in the absence of evidence to the contrary, the presumption was that the holding was adverse.

On the other hand, as stated in the case of *Stuttgart v. John*, 85 Ark. 526, where a vendor, after having executed a deed, remains in possession of the premises conveyed, he is presumed to hold in subordination to the title conveyed unless there is affirmative evidence of a contrary intention. It will be noted that the plaintiff in this case was the vendor of Burton, and there is no presumption that he intended to deny the title he had conveyed to Burton.

The distinction between the two classes of cases is clearly pointed out in the case of *Graham v. St. Louis, I. M. & S. Ry. Co.*, 69 Ark. 562, where the court said:

"The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are,

in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed." To the same effect, see *El Dorado v. Ritchie Grocery Co.*, 84 Ark. 52. We do not mean by what we have said to overrule the case of *Turman v. Bell*, 54 Ark. 273; but we adhere to the rule there announced, which is that if possession by the grantor is continued but a short time after the making of a deed, it may reasonably be referred to the sufferance of the grantee; but where it is long continued, it implies a right in the occupant, and the implication is sufficient to cast upon strangers the duty to inquire. In that decision the court was speaking with reference to a case where the grantor retained possession of the whole tract conveyed for a considerable time after the grant, and held that such possession was notice of reserved rights not expressed in the deed. Here there were no reserved rights, and the grantor only retained possession of an inconsiderable part of the land granted, which happened to be within his inclosure. In such case we do not think this retention of possession was inconsistent with his grant, and put upon appellee the burden of inquiring what his rights or equities were.

The decree will therefore be affirmed.

MISSOURI & NORTH ARKANSAS RAILWAY COMPANY

v. KILLEBREW.

Opinion delivered November 21, 1910.

- I. EQUITY—RELIEF AGAINST JUDGMENT AT LAW.—A party who has obtained a judgment at law will not be compelled in equity to submit to a new trial unless it clearly appears that it would be contrary to equity and good conscience to allow it to be enforced. (Page 522.)

2. SAME—NEW TRIAL—SUFFICIENCY OF DEFENSE.—A judgment at law will not be opened or vacated in equity if the defense set up by defendant is purely technical in its character, such as the statute of frauds. (Page 523.)

Appeal from Boone Chancery Court; *T. Haden Humphreys*, Chancellor; affirmed.

W. B. Smith & J. Merrick Moore, for appellant.

In view of the court's finding that appellant was deprived of its appeal in the case at law by accident and mistake, without negligence on its part, there is left but one question on this appeal, *i. e.*, whether the judgment at law was contrary to equity and good conscience, or "an unjust and unconscionable judgment."

To the first count of the complaint at law the appellant pleaded the statute of frauds as a defense, and the court's refusal to properly instruct the jury on the statute of frauds, as requested in appellant's offered instruction No. 3, deprived it of a meritorious defense. Kirby's Digest, § 3656; Eng. Stat. Frauds, 29 Car., § 17; Browne, Stat. Frauds (5 ed.), § § 355, 363, 366; 72 Ark. 363. The statute of frauds is recognized in equity, and the same construction is placed upon it as at law. 18 Ves. Jr. 175; 26 N. J. Eq. 504; 4 Johns. Ch. (N. Y.), 659; 69 Ark. 516.

Horton & South and Pace & Pace, for appellee.

1. Before a court of equity will interfere in this kind of a case, it must appear not only that the right of appeal was lost through unavoidable accident, but also that the party seeking the relief was himself free from fault. 61 Ark. 348; 75 Ark. 509; 43 Ark. 107; 64 Ark. 126.

2. The judgment at law was not unjust and inequitable. The law court was right in refusing to instruct the jury as requested by the appellant on the statute of frauds. Aside from the evidence showing delivery of the ties by the appellee at the place designated, and the failure of the evidence to show any acts of ownership by appellee thereafter, the written memorandum, signed by appellee and retained in the possession of the appellant's agent, is sufficient to take this case out of the statute of frauds. 45 Ark. 1-17; authorities cited; 35 Ark. 197.

HART, J. This action was instituted in the chancery court of Boone County by appellant against appellees to obtain a

new trial on account of unavoidable casualty preventing the appellant from filing its bill of exceptions within the time granted by the order of the Boone Circuit Court overruling its motion for a new trial in the case of L. B. Killebrew against the appellant.

The prayer of the complaint is that if Killebrew refuses to submit to a new trial in said cause in said circuit court, he be permanently enjoined from enforcing the judgment recovered by him.

Upon hearing the cause, the chancellor found that appellant had been deprived of its right of appeal from the judgment of the Boone Circuit Court in the case of L. B. Killebrew against it by accident and mistake without fault on its part, but that the said judgment of the Boone Circuit Court against it is not an unjust and unconscionable judgment, and that appellant is, therefore, for want of merit, not entitled to maintain this action.

A decree was entered dissolving a temporary injunction which had been theretofore issued in the case, and dismissing the complaint for want of equity. The case is here on appeal.

We do not deem it necessary to decide the question of whether any such mistake or accident was alleged or shown in appellant's complaint as justified the interference of a court of equity, for the reason that we are of the opinion that the judgment at law, of which appellant complains, was not unjust or inequitable. "A party who has obtained judgment after a full investigation of the controversy by a competent tribunal will not be forced by a court of equity to submit to a new trial unless justice imperatively demands it. It must clearly appear to that court that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party. *Whitehill v. Butler*, 51 Ark. 341, and cases cited; *Kansas & A. V. Ry. Co. v. Fitzhugh*, 61 Ark. 348. The facts in the case of L. B. Killebrew against appellant, briefly stated, are as follows:

Killebrew brought suit in the Boone Circuit Court against appellant to recover damages for breach of contract in the sale of some railroad ties. C. H. Smith was the agent of appellant, engaged in buying ties for it. He made a contract with Kille-

brew to buy 2,000 ties from him. Smith, in order to bind Killebrew, took out his order book, and wrote therein the following memorandum of the contract: "I hereby sell you about 2,000 white oak ties now at Everton at the rate of 48 cents. Ties at Everton within five days and paid for July 31, 1907," and had Killebrew to sign the same. Appellant's agent retained the written memorandum signed by Killebrew. Pursuant to their agreement, Killebrew placed the ties on the sidetrack of appellant's railroad at the point designated by Smith. When appellant's agents came along to inspect and take up the ties, they got into a dispute with Killebrew about the amount of culls to be taken up, and refused to take the ties. After the ties had remained there for several weeks, and appellant had refused to take them up, he sold them to other parties, and brought suit against appellant as above stated to recover the loss he sustained by appellant's alleged breach of the contract. Appellant pleaded the statute of frauds, and relied on section 3656 of Kirby's Digest to sustain its plea.

Appellant contended that, although the memorandum of the sale was inserted by appellant's agent in his own order book, and was required to be signed by Killebrew, appellant should not be taken to be bound by it because it was not signed by it or its agent. An instruction to this effect was presented to the circuit court and refused, and the action of the court in refusing the instruction, was assigned as error.

We do not decide whether or not the assignment of error was well taken, but affirm the decision of the chancellor on the ground that the defense interposed was purely technical and without merit.

"A judgment will not be opened or vacated if the defense set up by defendant, and which he proposes to plead, is not meritorious or is purely technical in its character or is dishonest or unconscionable. Of such character are the defense of usury, the coverture of defendant, plaintiff's want of capacity to sue, a plea of *ultra vires*, the statute of frauds," etc. 23 Cyc. 964 and 965.

In the case of *Johnson v. Branch*, 48 Ark. 535, the court, speaking through Chief Justice COCKRILL, said: "The accident alone does not warrant the interference of equity. The judgment must appear to give the winning party an advantage which a court of equity would not permit him to hold, in order to

warrant its extraordinary interference with proceedings at law. It grants relief against judgments in aid of justice, not as a recompense for the accident; and, although the law court may have committed error upon the trial, if the judgment is not against conscience, it will not meddle with it. The accident, or some other ground of equitable interposition, and the injustice of the judgment must concur."

Tested by this rule, we think the chancellor was right in denying the relief sought. The defense interposed by appellant in the suit at law was purely technical; and we do not regard it as a meritorious defense within the meaning of the rule just stated.

The decree will be affirmed.

GREER v. VAUGHAN.

Opinion delivered November 21, 1910.

1. ADVERSE POSSESSION—PAYMENT OF TAXES—EFFECT.—Payment of taxes on unimproved and uninclosed land, under Kirby's Digest, § 5057, constitutes constructive possession of the land, and when continued for seven consecutive years such possession ripens into a perfect title. (Page 527.)
2. SAME—PAYMENT OF TAXES—CONSTRUCTION OF ACT.—Under Kirby's Digest, § 5057, providing for the constructive possession of unimproved and uninclosed land by one who pays the taxes thereon, but that "no person shall be entitled to invoke the benefit of the act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three such payments must be made subsequent to the passage of the act," *held* that the act can be invoked when seven annual successive payments have been made, three of which were made after the passage of the act, but that it was not necessary that the taxes be paid for three years after the passage of the act. (Page 528.)
3. PLEADING—AMENDMENT—WAIVER OF OBJECTION—Where a new plaintiff who alone had a cause of action is brought into a case, and a new cause of action is introduced, the defendant waives any objection thereto by joining issue upon the merits with such new party and by seeking affirmative relief against him. (Page 529.)

4. IMPROVEMENTS—RIGHT TO RECOVER.—One who improves lands in good faith, believing that he is the true owner and in ignorance of another's title, is entitled to recover the value of improvements thus made by him. (Page 530.)
5. SAME—HOW VALUE DETERMINED.—The value of improvements is not determined solely by the cost thereof, but is based upon the enhanced value which these improvements at the time of recovery impart to the land, to be determined by the ordinary considerations that should apply to lands similarly situated. (Page 531.)

Appeal from Prairie Chancery Court, Northern District;
John M. Elliott, Chancellor; reversed.

W. A. Leach and *S. Brundidge, Jr.*, for appellant.

1. Appellant has acquired title, under the act of March 18, 1899, having color of title to the land beginning with the year 1874, the same being wild, unimproved and unoccupied for a period of over 30 years, and no improvements having been placed thereon until the year 1902; having also paid all taxes thereon since the year 1869, and especially the taxes thereon for each year in succession from the year 1894 to the year 1901, inclusive. 82 Ark. 51; 78 Ark. 95; 74 Ark. 302. A title acquired by adverse possession is sufficient upon which to base an action to quiet title. 76 Ark. 442; 20 Ark. 508; 20 Ark. 542; 12 Ark. 822.

2. McComb having purchased *pendente lite*, it was within the discretion of the court to allow him to be made a party plaintiff in the amended complaint. 79 Ark. 182, and cases cited. The plea of seven years adverse possession did not change the cause of action, and was not inconsistent with the original complaint.

3. Before one is entitled to the benefit of improvements under the "betterment act," he must be a *bona fide* occupant of the land, must have peaceably improved the same under color of title, and in good faith have believed himself to be the true owner. Kirby's Digest, §2457; 70 Ark. 484; 53 Ark. 545; 48 Ark. 133; 47 Ark. 528. And such improvements must have been made without actual notice of an adverse claim and in ignorance of the fact that any other person claimed a better right to the land. 45 Ark. 410; 46 Ark. 333; 67 Ark. 184.

Joe T. Robinson, for appellee.

1. Appellant can not establish title under the act of 1899. That act relates to constructive possession, and does not apply in cases where adverse claimants are in actual possession. In this case it is admitted that appellee was in actual possession when the litigation began. In treating McComb as a purchaser *pendente lite* the court overlooked the fact that he had failed to establish his purchase and that he claimed to have made the same prior to the beginning of the litigation; also that he sought to rely on a source of title which was not asserted by Greer himself. Moreover, the amended complaint did not allege that there was no adverse occupant of the land. Acts 1899, pp. 134-5, § § 2 and 6. Under the act at least three of the payments must have been made after the passage of the act, and all of the land must have been wild and unoccupied.

2, Appellee is entitled to the benefit of the betterments placed by him on the land.

FRAUENTHAL, J. This was a suit in equity, originally instituted by B. W. Greer, in August, 1907, to quiet the title in him to a tract of land situated in Prairie County. The land was patented by the United States to Archibald Hutchins in 1845. In the original complaint the plaintiff asserted title to the land through two sources. He claimed title to the land by mesne conveyances which extended back to Joseph R. Ferguson and James Q. Neil, to whom in 1852 said Archibald Hutchins had executed only a bond for title to said land. He also asserted title by virtue of a tax deed based upon a sale of said land made in 1872 for the nonpayment of the taxes of 1870 and 1871.

The appellee in his answer to this complaint claimed title to the land by virtue of a deed executed to him in 1900 by the sole heir of said original patentee; and he attacked the validity of said tax sale and of said bond for title as a conveyance in the chain of title to said land. In November, 1908, A. C. McComb as plaintiff filed an amended complaint, in which he sought to quiet the title to said land in him. In said amended complaint he set forth the same sources and chain of title as were set forth in the original complaint of B. W. Greer, and further alleged that in 1906 said Greer conveyed said land to him. In this amended complaint he set forth another source of title. He alleged that the land was unimproved and uninclosed, and that he and those under whom he claimed had paid the taxes on the

land for the time required by section 5057 of Kirby's Digest to create an investiture of title by adverse possession. To this amended complaint the defendant filed a demurrer upon the grounds that: (1) it did not state facts sufficient to constitute a cause of action, and (2) because there was a misjoinder of parties plaintiff and of causes of action. This demurrer was made a part of and incorporated in defendant's answer to the amended complaint, in which he set forth the same claim to title to the land and the same allegations as in his answer to the original complaint; and in the amended answer he asked for all equitable relief to which the facts entitled him. The court overruled the demurrer to the amended complaint, and permitted said McComb to be made a party plaintiff in the suit, and considered the amended answer of defendant as an answer to the amended complaint of said McComb and a cross complaint thereto.

Upon a hearing of the cause the court entered a decree dismissing the complaint for the want of equity, and granted to defendant the relief he asked for by quieting in him the title to said land and ordering the issuance to him of a writ of possession therefor. We do not deem it necessary to discuss or determine whether or not the plaintiff has shown a perfect chain of title to the land back to the original patentee from the United States or whether or not the tax sale of 1872 under which he claims is valid; because under the evidence adduced upon the trial of the case we are of the opinion that plaintiff obtained a complete investiture of title to the land by virtue of constructive adverse possession thereof under section 5057 of Kirby's Digest. By that statute it is provided that: "Unimproved and uninclosed land shall be deemed and held to be in the possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three such payments must be made subsequent to the passage of the act."

A compliance with the provisions of this statute constitutes in such person paying said taxes upon such character of land mentioned therein a constructive possession of the land which

like adverse possession ripens into a perfect title and creates in such person a complete investiture of the title thereto. *Towson v. Denson*, 74 Ark. 302; *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154; *Taylor v. Leonard*, 94 Ark. 122. The uncontroverted evidence in this case shows that the plaintiff and those under whom he claims paid the taxes upon the land involved in this litigation under color of title thereto for more than twenty years continuously prior to the institution of this suit, and certainly that they paid said taxes in the year of 1894 and in each year thereafter up to the institution of this suit. The land was unimproved and uninclosed and in the possession of no one during all of those years up to and until the defendant built a house thereon, and thus by taking actual possession thereof broke the continuity of the constructive possession from that date. There is an uncertainty as to the exact date when defendant built the house upon the land; but this uncertainty only grows out of the testimony of the defendant himself. He testified, doubtingly, that he built the house in the summer of 1901, but more positively that he built it in the summer of 1902; but in any event not prior to the summer of 1901. It is urged by counsel for defendant that under the provisions of the above statute it was necessary that the payment of the taxes on the land should have been made for a full period of three years after the passage of the act and prior to the date when defendant built the house on the land, before there could be constructive possession of the land for the full period under the statute. But this contention is not correct. The constructive possession of the land began with the date of the first payment of the taxes thereon, and it was only necessary to pay the taxes thereon for seven successive years and for a full period of seven years from that date in order to invoke the benefit of that statute, provided only that three of such payments were made after March 18, 1899, the date of the passage of said act. It was not under such circumstances necessary to pay the taxes for a period of three years after the date of the passage of the act, but only to make three successive payments of the taxes thereafter. In the case of *Price v. Greer*, 89 Ark. 300, in construing this provision of said statute, the court said: "We held in *Updegraff v. Marked Tree Lumber Company*, 83 Ark. 154, that the full period of seven years

must expire from the first of the seven payments required by the statute; but it does not follow from this that three years must elapse from the first payment after the passage of the act. The statute begins to run on the first payment of taxes, and the statute bar is complete at the end of seven years from that date, provided seven payments have been made in succession and three of same were made after the passage of the statute." The plaintiff and his grantor paid the taxes on this land in 1894, and made seven successive payments of the taxes thereafter and for the full period of seven years from that date and prior to the summer of 1901, the earliest date when under any view of the testimony the defendant built the house on the land; and he made three of these successive payments of taxes after March 18, 1899, the date of the passage of the act, and prior to the summer of 1901, to wit: on March 25, 1899, April 4, 1900, and January 7, 1901. It follows therefore that the statute bar became complete prior to the summer of 1901 and prior to that date the plaintiff by virtue of said statute became completely invested with the title to said land.

It is urged that B. W. Greer, the original plaintiff, had no cause of action at the time of the filing of the original complaint and the institution of this suit because he had prior to that date conveyed the land in controversy to McComb; and that the complaint could not be amended by making another plaintiff who had such cause of action. It is also urged that the investiture of title in plaintiff by adverse possession was for the first time alleged in the amended complaint, and that this was a new cause of action. The defendant interposed his objection by demurrer to the action of the court in allowing said McComb to be made a party and to file the amended complaint; but at the same time, and without resting thereon, he filed his answer thereto, and in his answer asked for affirmative relief. The issues of fact were thus joined by the pleadings, and thereupon were fully developed by the evidence by both parties. The lower court in its decree granted to the defendant affirmative relief by quieting the title to the land in him and by giving to him a writ of possession for the land which plaintiff had obtained in 1906. The defendant accepted the relief granted to him by the lower court, and in this court has endeavored to

maintain it. We think that by this action the defendant has in effect consented to the order of the court making McComb a party plaintiff and to the amendment made by the insertion of the alleged new cause of action. He has waived his objection thereto by joining issue on the merits of the case and seeking relief against McComb, and by accepting the benefits granted to him by virtue of his litigating those rights and by now endeavoring to maintain them in this court. An amendment making new parties to a complaint wherein the original plaintiff did not show a cause of action is like an amendment setting up an entirely separate and distinct cause of action. In each case it is equivalent to bringing a new action. When an original action is brought, the defendant may waive summons and enter his appearance thereto, and does so by answering without objection.

And he waives his right to complain that new parties who alone had the cause of action were made to the suit, or a new cause of action was introduced, where, after objection made by him, he by his pleading and by the litigation joins issue with such new parties upon the merits of the case and seeks affirmative relief against them. He cannot thus occupy two inconsistent positions; in the one objecting that they be made parties and in the other position seeking relief against them and thus in effect asking that they be made parties. By this action he enters his appearance to the new suit brought by the new parties and to the new cause of action. As is said in the case of *Ward v. Ward*, 59 Ark. 446: "The same result was reached as would have been accomplished had a new and original complaint been filed. In that case the appellant could have entered its appearance, as it did, and waived summons, and the same end would have been obtained as was reached by the filing of the amendment. The legal effect of the two proceedings is the same." 1 Ency. Plead. & Prac. 573; *Thompson v. Brazile*, 65 Ark. 495; *Choctaw, Oklahoma & Gulf Rd. Co. v. Hickey*, 81 Ark. 579; *Ferguson v. Carr*, 85 Ark. 246.

In his answer the defendant asked for the recovery of the value of the improvements which he made on the land; and we think that he is entitled to recover this. In 1900 he purchased the land, and obtained a deed therefor from the sole

heir of the patentee out of whom the legal title had not passed, and in the summer of 1901 and 1902 he made these improvements, which were of a lasting and permanent character. At that time the land was wild and unimproved and in the actual possession of no one. The only notice that he had that plaintiff or his grantor had a better right to this particular tract was such as could be gained from the records, although he had heard that Greer was claiming to own some lands in that vicinity; and Greer did actually own other lands in that vicinity. We think the evidence showed that he improved the lands in good faith, believing that he was the true owner, and in ignorance of his title to this particular land being actually questioned. Under such circumstances he was entitled to recover the value of the improvements thus made by him on the land. *Shepherd v. Jernigan*, 51 Ark. 275; *McDonald v. Rankin*, 92 Ark. 173.

The value of the improvements is not determined solely by the cost thereof; but "the value thereof is based upon the enhanced value which these improvements at the time of the recovery impart to the land." And "such enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that would apply to lands that are similarly situated." *McDonald v. Rankin*, *supra*.

We have examined the testimony relative to the value of the improvements, and we think that under the evidence the defendant is entitled to recover \$350 therefor.

The decree of the lower court is reversed, and this cause is remanded with directions to enter a decree quieting the title to said land in the plaintiff, McComb, and giving judgment in favor of defendant for \$350 for the value of the improvements made by him on the land.

MILES v. MONROE.

Opinion delivered November 21, 1910.

1. GIFT—VALIDITY.—A gift, executed by delivery and not fraudulent as to creditors, is as binding and irrevocable as a sale would be. (Page 537.)

2. **SAME—EFFECT AS TO EXISTING CREDITORS.**—A voluntary transfer of property by one in debt is presumptively fraudulent as to creditors then existing; and if the debtor is insolvent or the gift will necessarily hinder, delay or defraud the donor's existing creditors, then the gift is conclusively fraudulent. (Page 537.)
3. **SAME—VALIDITY.**—Where at the time he makes a gift, the donor owes no debts, or a small amount in comparison to the property retained by him, the gift is valid. (Page 538.)
4. **SAME—VALIDITY AS TO SUBSEQUENT CREDITORS.**—To avoid a gift, a subsequent creditor must show that it was made with the actual intent to defraud him. (Page 538.)
5. **SAME—SUBSEQUENT CREDITORS—SUBSEQUENT INSOLVENCY.**—A gift cannot be shown to be void as to a subsequent creditor by proof merely that the donor subsequently became insolvent. (Page 539.)
6. **SALE OF CHATTEL—CONSIDERATION OF MARRIAGE.**—A transfer of property in consideration of an engagement to marry is based upon a valuable consideration, but such transfer must have been made before the engagement was entered into. (Page 539.)
7. **INSTRUCTION—AMBIGUITY—FORM OF OBJECTION.**—An objection to an ambiguous instruction must be specific. (Page 540.)

Appeal from Howard Circuit Court; *James S. Steel*, Judge; affirmed.

W. P. Feazel and *W. C. Rodgers*, for appellant.

1. The evidence does not sustain the verdict. The facts that Mr. Wade was riding the mare a large part of the time, that the two horses were kept together at his house all the time when he was not riding, that appellee never assessed the mare as her property nor did any one for her, and Wade's claim to divers persons that he owned the mare, are inconsistent with a claim of a gift. There was nothing in the conduct of the parties to put the bank on inquiry whether the mare was appellee's property. 76 Ark. 457; 77 Ark. 147; 78 Ark. 62; 84 Ark. 263; 46 N. Y. 684; 78 N. E. 5. In order to effect a gift, the donor must part with all control whatever of the thing given, completely and for all time.

2. The first instruction given at appellee's request is erroneous in that it makes the fact of delivery and possession conclusive of her claim.

3. Instruction No. 2, given for appellee, gives undue emphasis to the rule of evidence that admissions against interest are competent evidence. It is improper for a court to dilate upon

a mere rule of evidence in its instructions. 62 Ark. 286, 312; 75 Ark. 76, 86; 78 Ark. 87, 93.

4. The third instruction given at appellee's request is self-contradictory in stating that the owner of property may give it to whom he chooses, regardless of creditors or children, and later stating that if possession was given and the gift was not in fraud of creditors, the jury could find for the plaintiff.

5. Instructions 2 and 3, requested by appellant, should have been given. A party to a contract cannot derive any benefit therefrom where he does not in good faith intend to perform it. If appellee did not intend to perform the alleged contract of marriage with Wade, she cannot claim the property as against those who, in good faith, have advanced money to him. 129 S. W. 530, 531.

6. If Wade was in debt at the time the alleged gift was made, such gift was unlawful, and appellee's claim must fail. The fourth instruction requested by appellant should have been given. Kirby's Digest, § 3658. Where marriage is the consideration for an agreement, there is no consideration until the marriage is performed. 10 Ark. 53, 60; 124 S. W. (Ark.) 124, 126. Nor is the appellee aided by reason of the fact that debt to the bank is a subsequent transaction. The statute, *supra*, says that such conveyance shall be void as to prior and *subsequent* creditors.

Sain & Sain and *T. D. Crawford*, for appellee.

1. The testimony was legally sufficient to sustain the verdict.

2. Appellant's objection to the first instruction overlooks that element of the instruction which tells the jury that *if Wade bought the mare for appellee* and delivered the animal to her in pursuance of that purpose, then there was a consummated gift. If the transaction was a gift, there is no evidence tending to prove that Wade was guilty of any actual or intentional fraud in making it, and subsequent creditors could not be heard to complain. 50 Ark. 42; 56 Ark. 253; 1 Moore, Fraud. Conv. § 3. A gift accompanied by delivery and subsequent peaceable possession can no more be revoked than a sale. 14 Ark. 505. An antenuptial conveyance or settlement of property, made in consideration of marriage, is upon a good and valuable con-

sideration, and is valid as against creditors of the grantor. 1 Moore, Fraud. Conv. § 25; 20 Cyc. 504; Rodgers, Dom. Rel. § 161.

3. There is no merit in appellant's contention that the second instruction given at appellee's request lends undue influence to the rule of evidence that admissions against interest are competent. Such instructions are not prejudicial where the whole charge to the jury directs them to consider all the facts and circumstances proved in the case. 93 Ark. 316.

4. Appellant's objection to the third instruction given is not tenable here. Ambiguity in an instruction should be met by a specific objection. Moreover, it could not have been prejudicial because there is no proof that the gift was in fraud of creditors.

5. Instructions 2 and 3, requested by appellant, were properly refused. There is no proof that appellee ever refused to marry Wade. No contention that her engagement was fraudulently entered into. In case of such contention the acts constituting fraud must have been specifically alleged and proved. 77 Ark. 355; 34 Ark. 63.

Her title based on the consideration of marriage did not fail by reason of the death of Wade before the marriage was consummated. 4 App. Div. (N. Y.) 22, 26; 5 Allen 454, 81 Am. Dec. 758.

6. The fourth instruction requested by appellant was properly refused. (1) There is no evidence that Wade was indebted at the time of the gift, and that such indebtedness still existed. (2) The mere fact that he was in debt at the time was not sufficient, in the absence of proof of intentional fraud, to set aside the gift in favor of a subsequent creditor. 56 Ark. 253; Rodgers, Dom. Rel. § 165. (3) It being admitted that a promise of marriage is a valuable consideration, the doctrine as to voluntary conveyances does not apply.

FRAUENTHAL, J. This was an action of replevin instituted by the plaintiff below, Hessie Monroe, to recover the possession of a sorrel mare. Both the plaintiff and defendant claimed title to the mare from a common source, by acquisition thereof from one J. M. Wade. The plaintiff claimed the property by virtue of an alleged gift made to her by Wade on April 7, 1909, and the defendant by virtue of a sale made under a mort-

gage executed by Wade on September 4, 1909. The plaintiff and said Wade on April 7, 1909, and for some years prior thereto resided near Perryville in the State of Tennessee. The plaintiff is a young lady, who at that time and up to the date of the trial lived with and as a member of the family of her father, W. M. Monroe. J. M. Wade was a widower, who with his two children made his home with said W. M. Monroe for some years prior to the above date. The testimony on the part of the plaintiff tended to prove that J. M. Wade bought the mare in controversy, and on April 7, 1909, gave and delivered her to the plaintiff at the home of her father in the State of Tennessee. The testimony tended further to prove that Wade at that time was the owner of a number of head of mules and other property and moneys aggregating several thousand dollars, and there is no testimony that he owed at that time any indebtedness, except probably \$400. On or about April 15, 1909, W. M. Monroe, with the plaintiff and the other members of his family, and J. M. Wade moved to Nashville in the State of Arkansas; and from that date until the date of his death on October 26, 1909, J. M. Wade lived with said Monroe. The testimony tended to prove that the mare was brought from Tennessee by the father of plaintiff at the time the said parties moved to Arkansas, and was shipped with some of his and Ward's stock; and from that time was claimed by and remained in the possession of plaintiff, and was recognized by Wade as her property. On September 4, 1909, J. M. Wade executed to the Bank of Mineral Springs a mortgage on a lot of sawmill property, a large number of head of stock, amongst which was the mare in controversy, and on other personal property, in order to secure a note for \$2,000 made on that day. It appears that J. M. Wade became ill on October 21, and died on October 26, 1909, and that default was made in complying with the provisions of said mortgage. Thereafter the mortgagee took said property from the possession of plaintiff and against her protest, and the same was sold by virtue of the mortgage, and at such sale the defendant became the purchaser. Upon her cross examination the plaintiff testified that she and J. M. Wade were engaged, and she supposed that this was the reason why he gave her the mare, and that she accepted it upon that consideration. The

defendant introduced testimony tending to prove that three or four months prior to the death of J. M. Wade plaintiff stated that she would commit suicide before she would marry him.

During the progress of the trial the defendant offered to prove the financial condition of J. M. Wade after he moved to Arkansas; and also offered to prove that defendant had purchased the mare in controversy under a sale made by order of the chancery court in a suit foreclosing said mortgage, but to which suit plaintiff was not a party; but the lower court refused to permit the introduction of any of the above offered testimony.

At the instance of defendant the court, among other instructions, gave the following to the jury:

"No. 5. You are instructed that a valid gift cannot be made without delivery of the thing given. And, in order that the change of possession be sufficient in law, it must be complete and unequivocal and with the intent at the time that the donor or giver is to lose all control over the thing given for all time to come. The transaction must be understood by and between both parties as forever depriving the giver of the thing given and all authority, right of possession and control over the same. And, if this state of things is not shown by a preponderance of the evidence, your verdict must be for the defendant."

The court refused to give the following instruction requested by defendant:

"No. 4. The jury are instructed that J. M. Wade in his lifetime could not lawfully have given to the plaintiff the mare in controversy if he was at the time indebted and said indebtedness is still unsatisfied. So, if you find from the evidence that he was in debt at the time he is alleged to have given the mare in controversy to the plaintiff, and said indebtedness still exists, the gift is unlawful, and the plaintiff cannot recover."

And at the request of the plaintiff it gave the following instruction: "No. 3. You are instructed that any one has a right under the law to give his property to any person he desires to in preference to his children or creditors; and the fact that J. M. Wade afterwards mortgaged said mare to the Bank of Mineral Springs would not defeat this plaintiff from recovering said mare, provided you believe that there was a gift and

delivery of possession during the life of J. M. Wade, provided you believe that said gift was not in fraud of creditors."

The defendant asked the court to give the following instructions which were refused:

"No. 2. You are instructed that if you believe from the evidence that J. M. Wade gave the mare in controversy to the plaintiff in consideration of her promise of marrying him and that there has been no marriage, then the gift must fail."

"No. 3. If you believe from the evidence that J. M. Wade gave the mare to the plaintiff in consideration of her promise of marrying him and that she did not intend to do so, then you will find for the defendant."

The jury returned a verdict in favor of the plaintiff, and the defendant has appealed to this court.

Under the pleadings and the testimony that was legally admissible the sole question that is involved in this case is whether or not J. M. Wade made a valid gift of the mare in controversy to plaintiff on April 7, 1909, and before they moved to the State of Arkansas. For, if such a valid gift was made, then Wade could not defeat her right to the property by the mortgage which he subsequently executed thereon. In order for such a gift to have been valid, it was necessary that it should have been fully executed between the parties themselves, and must not have been fraudulent, either as to existing or subsequent creditors. Such a gift was valid and binding between the parties if it was the purpose and intent of Wade to make a gift of the property to plaintiff and in pursuance of that intention he did actually make a complete and unconditional delivery of the property to her. In such event the title to the property as between the parties passed to the plaintiff, and the gift became as irrevocable as a sale of the property by him to her would have been. *Ryburn v. Pryor*, 14 Ark. 505; *Williams v. Smith*, 66 Ark. 299.

It was incumbent upon the plaintiff to prove that Wade did voluntarily transfer to her the title and deliver to her the possession of the mare; and if he did this, although without any consideration, the plaintiff became the owner of the property. We think that there was sufficient testimony adduced on the trial of this case relative to the acts, conduct and declarations

of Wade to sustain the finding of the jury that he made a gift of the mare to the plaintiff.

We do not think that the voluntary transfer of the mare by Wade to plaintiff was invalid or fraudulent as to his creditors, under the facts of this case. A voluntary transfer of property by one in debt is presumptively fraudulent as to creditors then existing, and if the debtor is at the time of such gift insolvent or if the gift is of such an amount or made under such circumstances as that it will necessarily hinder, delay or defraud the existing creditors of such donor, then such voluntary transfer becomes conclusively fraudulent and invalid as to such existing creditors. But if the donor owes no debts at the time of such gift, or of such small amount in comparison with his assets that he retains property amply sufficient, to pay such antecedent debts, then the gift will be perfectly valid. *Smith v. Yell*, 8 Ark. 470; *Bertrand v. Elder*, 23 Ark. 494; *Chambers v. Sallie*, 29 Ark. 407; *Rudy v. Austin*, 56 Ark. 73.

In the case at bar there was no evidence tending to prove that said Wade owed any debts at the time the gift was made except probably \$400, and there was testimony proving that he owned property in addition to the mare in controversy exceeding \$2,000 in value.

Nor was there any testimony adduced or offered upon the trial of the case tending to show that the gift was made in fraud of subsequent creditors. In the case of *Compton v. Schaap*, 56 Ark. 253, it is said: "To avoid a voluntary conveyance, a subsequent creditor must show that it was made with the actual intent to defraud. He cannot, like a prior creditor, raise a presumption of such intent by merely showing that the grantor was in debt at the date of the conveyance." Before a voluntary conveyance can be set aside at the instance of subsequent creditors, the evidence must show that such conveyance was made with the actual intent to defraud such creditors. *Toney v. McGehee*, 38 Ark. 427; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42.

There was no testimony adduced upon the trial of the case at bar tending to show that at the time Wade gave the mare to plaintiff he contemplated incurring any further indebtedness or that he made the gift with the intent to defraud any sub-

sequent creditor. Under the undisputed testimony adduced, he was at the time of the gift in solvent circumstances and the owner of considerable property. This property he continued to own until the date of his death, and the fact that several months after he made the gift and after he had moved to Arkansas he incurred debts would not be sufficient to show that he made the gift of the mare to plaintiff with the fraudulent intent thereby to defeat such subsequent creditors in the collection of their debts.

It follows that the court did not err in refusing to give said instruction number 4, asked by defendant, because there was no testimony that he owed debts at the time that the gift was made which were still unpaid; and for the further reason that the indebtedness which he did owe was small in amount in comparison with his assets, and the gift did not result in his insolvency or his inability to pay such indebtedness. Nor did the court err in refusing to permit defendant to prove the financial condition of Wade after he moved to Arkansas for the reason that there was no testimony tending to show that at the time Wade made the gift in Tennessee he did so with intent to defraud any subsequent creditor, and such offered testimony would not have been sufficient to prove such intent.

It is urged by counsel for appellant that the court erred in refusing to give the above instructions numbers 2 and 3, requested by the defendant. But these instructions were, we think, abstract, and were not applicable to the issue involved in the case or the testimony given on the trial. The sole issue involved in the trial of the case was whether or not Wade had made a valid gift of the mare to plaintiff. Marriage in contemplation of law is a valuable consideration upon which to support a transfer of property, and, while it cannot be expressed in dollars and cents, it is still a consideration of actual value. A transfer of property made, therefore, in consideration of a promise to marry is not a gift, but a sale, and is as effective and binding as a sale founded on any other valuable consideration. 1 Page on Contracts, § 299; *Prewitt v. Wilson*, 103 U. S. 22.

But, before it can be said that such transfer is based upon the consideration of marriage, it must be made in consideration of the promise to marry, and, therefore, prior to the engage-

ment of marriage; for if it was made after such engagement was consummated it would not be an inducement to or a consideration of the contract of marriage. *Chambers v. Sallie*, 29 Ark. 407.

In the case at bar there was no testimony tending to prove that the mare was transferred to plaintiff in consideration of her promise to marry Wade. The only testimony relative to that phase of the case was given by the plaintiff upon her cross examination. She testified that she and Wade were engaged, and that she supposed that this was the reason why he gave her the mare, and that she accepted it upon that consideration. According to this testimony, she acquired the property after the engagement and contract of marriage was made, and not in consideration of her making the contract of marriage. Her statement that she accepted the mare upon the consideration that they were engaged was in effect only a statement by her that she accepted it because they were engaged.

The above instruction number 3, given at the request of plaintiff, was ambiguous. The defendant should have advised the lower court of his specific objections to this instruction, and this he did not do. If he had done so, the court would no doubt have so worded the instruction that it would have set forth in more definite and certain language the correct principle of law therein announced. Having failed to make specific objection to this instruction, he cannot now complain.

Upon an examination of the whole case, we think the real and sole issue in this case was fairly submitted to the jury, and we do not find that any prejudicial error was committed in the trial.

The judgment is affirmed.

FOURCHE RIVER LUMBER COMPANY v. WALKER.

Opinion delivered October 24, 1910.

1. MORTGAGES—EFFECT OF FORECLOSURE UPON WIDOW'S DOWER.—The widow of a deceased mortgagor is not barred of dower in the mortgaged lands by a decree of foreclosure and sale thereunder, though she was a party to the suit, unless her right to dower was directly put in issue. (Page 544.)

2. JUDGMENT—CONCLUSIVENESS.—The rule that a valid decree in a suit cuts off all defenses which might have been pleaded therein refers only to such matters as properly belonged to the subject of the controversy and are within the scope of the issues. (Page 545.)
3. LIMITATION OF ACTIONS—DOWER.—The statute of limitations does not run in favor of the heirs of a deceased husband against a suit of his widow for dower, nor bar her suit against the purchaser at a mortgage sale after his death until the expiration of seven years from the date of such purchase. (Page 545.)
4. LACHES—RECOVERY OF DOWER.—In a suit in equity by a widow for dower brought within the statutory period, in which she asks no relief peculiar to a court of equity but asks for the enforcement of a plain legal right, the doctrine of laches has no application. (Page 545.)
5. CONFIRMATION DECREE—CONCLUSIVENESS.—A decree confirming a title purchased at mortgage foreclosure sale will not preclude the widow of the mortgagor from suing for dower in the mortgaged land if her right to dower was not put in issue in the foreclosure suit, and she was not made a party to the confirmation proceeding. (Page 545.)

Appeal from Perry Chancery Court; *Jeremiah G. Wallace*, Chancellor; affirmed.

Sellers & Sellers, for appellant.

1. There is no proof that appellee was the wife of Powell at the time of the execution of the mortgage, and, since three years elapsed between the execution of the mortgage and his death, the fact that she was his wife at the latter date does not warrant the presumption that she was his wife at the former date. The presumption is that the chancellor, in the foreclosure proceedings, found that appellee became the wife of Powell after the execution of the mortgage; otherwise there is no warrant for the decree. 71 Ark. 91. And, if so, she had only an equity of redemption in the lands, and her remedy, if the decree was erroneous, was by appeal. 80 Ark. 579; 73 Ark. 37; 90 Ark. 166. Decree in that suit, if valid, cut off all defenses which might have been pleaded therein. 77 Ark. 382.

2. The Greenville Stave Company fully complied with the requirements of the confirmation statutes, Kirby's Digest, § § 661-675, and § § 649-660, and, if the appellee owned any interest in the land, it was divested by the decree rendered in that proceeding. Appellee was barred to set up claim to the land in consequence of any informally or illegality in the proceedings, after one year from the rendition of the decree. Kirby's Digest,

§ 673. The statute began to run against her on the termination of her second marriage, and remarriage would not have stopped it. 10 Ark. 581; 16 Ark. 612.

3. The five-year statute of limitations, Kirby's Digest, § 5060, bars appellee's right of action. This statute begins to run upon confirmation of the sale. 77 Ark. 242. No exceptions being made in favor of married women, the courts can make none. 46 Ark. 25; 76 Ark. 146.

4. Appellee is barred by laches; her claim is stale. 90 Ark. 430; 87 Ark. 232; 86 Ark. 591.

P. H. Prince, for appellee.

1. The chancellor's finding that appellee was Powell's wife at the time the mortgage was executed is sustained by the pleadings and the evidence.

2. "The widow of a deceased mortgagor is not barred of her dower in the mortgaged lands by decree of foreclosure, though she was a party to the suit, unless her right to dower was put in issue." 40 Ark. 283.

3. The statute, Kirby's Digest, § § 661-675, is intended to cure defects in sales, and not to vest title. 83 Ark. 154; 69 Ark. 517. And § § 649-660 provide for confirmation of land that is wild, or unimproved, or in actual possession of the petitioner. Any person having or claiming any interest in such land must be summoned as a defendant in the case. Kirby's Digest, § 650. A married woman may institute an action to set aside the decree any time within three years after its rendition. *Id.* § 657.

4. The five-year statute of limitation does not apply in this case. The widow's right to dower was not put in issue 40 Ark. 283. This statute, Kirby's Digest, § 5060, does not run against persons who were not parties nor bound by a suit in which the sale was made. 83 Ark. 51; 58 Ark. 186; 81 Ark. 462-3; 33 Ark. 294.

5. Appellee's claim is not stale. It requires seven years adverse peaceable possession to bar the widow's right to dower. 29 Ark. 651; 40 Ark. 25; 89 Ark. 19; *Id.* 349.

HART, J. This was an action brought by Mrs. Rosa Walker in the Perry Chancery Court against the Fourche River Lumber Company, a domestic corporation, to recover dower in certain

lands, which she alleges are in the possession of the defendant company. We take the following statement of facts from the abstract of appellant:

One G. W. Powell, on the 23d day of September, 1896, being the owner of the land in controversy, mortgaged it to one W. H. Blackwell. Powell died August 9, 1899, leaving appellee his widow, and certain minor children his heirs at law. W. H. Blackwell also died, and on May 25, 1901, R. L. Nichols, legatee of Blackwell, brought suit to foreclose said mortgage against appellee and the minor heirs of Powell. The prayer of the complaint is for the foreclosure of the mortgage, the sale of the land, "and that all equity or redemption be forever barred and foreclosed," etc. Appellee was duly summoned. Decree was rendered August 30, 1901, showing that appellee made default. The decree containing the following recital: "That if said debt and interest be not paid by the 15th day of September, 1901, that all the right, title and equity of redemption of the said Rosa Powell, and the said Noel Powell, Sewell Powell and Evan Powell is forever barred and foreclosed," etc. Sale was made on the 1st day of October, 1901, as ordered by the decree, the land being bought by the Greenville Stave Company; sale was duly reported and confirmed by the court February 5, 1902. Deed was executed and acknowledged and approved in open court on the same day. After Powell's death, appellee, thinking she had lost the land, abandoned it, and never took possession or paid the taxes on it afterwards. The said Greenville Stave Company after its said purchase filed its petition for confirmation on November 2, 1904, and its title to said lands was duly confirmed, the decree containing the following recital: * * * "The court doth examine said petition, and finds that it was filed on the 2d day of November, 1904, and it doth examine the proof of publication, and doth find that due notice was given both by the petitioner under the terms of the act of the State of Arkansas, embraced in section 661 to 675 of Kirby's Digest of the statutes of the State of Arkansas, and by the clerk of this court under the statutes of the State of Arkansas as embraced in section 649 to section 660 of said digest. The court doth further find that there was filed with the complaint in said cause copies of the tax receipts for the years 1901, 1902 and 1903, and that is also the affidavit of one John Murphy that

no one is in the actual possession of the said lands claiming title to them adverse to the petitioner, and, the court finding that both of said laws have in all respects been complied with and the petitioner is entitled to a confirmation of its title to said lands, it is considered, ordered and decreed that the title of petitioner to said lands be confirmed," etc. And specifically confirmed and quieted the title as to the foreclosure proceedings.

On October 13, 1904, the Greenville Stave Company deeded the land to appellant, and on November 29, 1907, appellee instituted the present suit against appellant for dower in the land. Other facts will be stated in the discussion of the issues presented for our determination.

A decree was entered in favor of the plaintiff, and to reverse that decree an appeal has been duly prosecuted to this court.

It is insisted by counsel for the defendant that the record does not show that Mrs. Rosa Walker was married to George Powell at the time he executed the mortgage to the lands in question to W. H. Blackwell. It is true that she does not directly state the date of her marriage to Powell; but her complaint alleges that "she was the lawful wife of G. W. Powell, and that he lived in Perry County, Arkansas, and died August 9, 1899, leaving the plaintiff, his widow, and three minor children, N. G. Powell, five years, S. B. Powell, two years old, and G. E. Powell, born September 7, 1899, after their father's death, and this allegation is admitted by the defendant in its answer. It was agreed between the parties to this suit that the papers and proceedings in the suit to foreclose the mortgage might be read in evidence in this case. The complaint in that case alleged that the minor children above named were the heirs-at-law of G. W. Powell, deceased, and were in the custody of their mother, Rosa Powell, who is now Rosa Walker, the plaintiff.

The mortgage was executed by G. W. Powell on September 23, 1896, and he died August 9, 1899. It is alleged by plaintiff that their oldest child was five years old at his death. The chancellor found that plaintiff was the wife of G. W. Powell at the time the mortgage was executed by him, and it can not be said that his finding is not supported by the evidence. In the case of *McWhirter v. Roberts*, 40 Ark. 283, the court held:

"The widow of a deceased mortgagor is not barred of dower in the mortgaged lands by a decree of foreclosure, though she

was a party to the suit, unless her right to dower was put in issue."

The record shows that plaintiff's right to dower was not in issue in the suit to foreclose the mortgage, and this is conceded by counsel for defendant, but they contend that the rule announced in the case of *McWhirter v. Roberts*, above quoted, has been overruled by the decision in the case of *Livingston v. New England Mortgage Security Company*, 77 Ark. 379, where it is held that a valid decree in a suit cuts off all defenses which might have been pleaded therein. It is true that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been decided in that suit; but this refers to all matters properly belonging to the subject of the cotroversy, and within the scope of the issues. In other words, the defendant must set forth in his answer all grounds of defense that he may have, or he will be held to have waived such defenses as he failed to set out.

The plaintiff's right to dower was not in issue in the suit to foreclose the mortgage, and was not barred by the decree of foreclosure.

2. Her suit for dower is not barred by the statute of limitations. In the case of *McWhirter v. Roberts*, *supra*, it was held that "the statute of limitations does not run in favor of the heirs of a deceased husband against a suit of his widow for dower, and does not bar her suit against the purchaser at a mortgage sale after his death until the expiration of seven years from the date of his purchase." The record shows that the present suit was brought within seven years from the date of the purchase of the lands at the foreclosure sale.

3. The defense of laches is not available to the defendant. The plaintiff is not seeking to set aside the foreclosure decree, and the cases of *Jackson v. Bechtold Printing & Book Mfg. Co.*, 86 Ark. 591, and other cases cited by counsel have no application. Here the plaintiff has brought an independent suit for dower within the statutory period, she is not invoking the aid of the court or set aside or annul any former decrees affecting the land, and the doctrine of laches has no application.

4. The plaintiff is not precluded from maintaining her suit by the confirmation proceedings. She was not made a party to that proceeding, and is not affected by it. The effect of the

confirmation proceeding was not to invest the petitioner therein with title, but only perfected such title as had been already obtained under the foreclosure proceedings. *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154.

As we have already seen, the plaintiff's right to dower was not in issue in the foreclosure suit, and it is not affected by the confirmation proceeding because she was not made a party to it.

The decree will be affirmed.

ON REHEARING.

Opinion delivered December 5, 1910.

HART, J. 1. Counsel for appellant insist that the court erred in holding that the seven-year statute of limitations applies to this case. They urge with much force and plausibility that the five-year statute governs. It is as follows: "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Sec. 5060, Kirby's Digest.

In support of their contention, they cite the cases of *Cowling v. Nelson*, 76 Ark. 146, and *McGaughey v. Brown*, 46 Ark. 25, in which the statute protecting purchasers at judicial sales was held applicable. In those cases the suit was to set aside the sale and to recover the lands sold at the judicial sale. The suit in this instance was not against the purchaser for the recovery of the land sold at the judicial sale. The suit was not brought to recover the land, but to enforce appellee's right to dower. The suit had no connection whatever with the decree under which appellants purchased. The dower of appellee was not put in issue in the foreclosure suit, and, following the case of *McWhirter v. Roberts*, 40 Ark. 283, we held that she was not barred of dower by the foreclosure suit. If this be correct, her suit for dower is a suit to establish and secure an independent right given her by statute, and is in nowise connected with or dependent upon the validity or invalidity of the purchase at the foreclosure sale. Her right to dower not having been put in

issue in that suit, it stands as if she had not been a party to it, as far as her right to dower is concerned. See *Phelps v. Jackson*, 31 Ark. 272.

It was the duty of the heirs of the mortgagor in this case to assign dower, and, the title of the purchaser under the mortgage foreclosure sale being derived from them, such purchaser became bound by the same statute of limitations as the heirs. It follows that the decision in *McWhirter v. Roberts*, *supra*, that the seven-year statute applies in such cases was right.

2. Counsel for appellants also insist that we were wrong in holding that appellee was not barred of her right of dower by laches. We do not agree with them. It is well settled that the doctrine of laches does not apply to a case where the plaintiff is not asking any equitable relief, but is seeking only to enforce a plain legal right. *McFarlane v. Grober*, 70 Ark. 371; *Rowland v. McGuire*, 67 Ark. 320; *Waits v. Moore*, 89 Ark. 19; *Chatfield v. Iowa & Arkansas Land Co.*, 88 Ark. 395.

Appellee's right to dower is given by statute, and is not barred until the period under which she had a right to bring her suit therefor has elapsed.

Other matters are pressed upon us for a rehearing, but we think we have sufficiently discussed them in our original opinion, and adhere to what was there said.

The motion for a rehearing must be denied.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. EVANS.

Opinion delivered November 14, 1910.

1. INSTRUCTIONS—AMBIGUITY—GENERAL OBJECTION.—An ambiguous instruction, which probably was not misunderstood when considered with other instructions, was not open to a general objection. (Page 550.)
2. RAILROADS—ORDINARY CARE—GOOD FAITH NOT A TEST.—An instruction, in an action against a railroad company for damages for failure to use due care after discovering decedent's peril, that if defendant's engineer saw decedent some distance ahead, but believed in good faith that he was in no danger, and proceeded without attempting to

stop or give signal, defendant would not be liable, was erroneous in making good faith of the engineer the test of ordinary care. (Page 550.)

3. TRIAL—ARGUMENT.—Improper remarks of counsel do not call for a reversal if it appears that they had no prejudicial effect. (Page 550.)

Appeal from Pope Circuit Court; *Hugh Basham*, Judge; affirmed.

Lovick P. Miles and *Thomas B. Pryor*, for appellant.

1. The decision of this court on former appeal, 87 Ark. 628, left no question at issue but the one whether or not, under the emergency shown, the engineer acted with ordinary care. The fourth instruction, given by the court, errs in that it eliminates the question of the engineer being in the exercise of ordinary good care when under the emergency existing he believed it would be safer not to blow the whistle or ring the bell. 60 Ark. 586.

2. There is no presumption of law that the engineer saw the deceased, knew that he was a man insensible of his danger in time to have avoided injuring him, and thereafter failed to exercise reasonable care to avoid such injury, but such fact must be proved. 77 Ark. 404-5.

3. Argument of appellee's counsel to the jury, being a patent effort to arouse the passions and prejudices of the jury rather than to assist them in weighing the evidence and arriving at a true verdict, was prejudicial, and the cause should be reversed because of such argument. 91 Ark. 95; 7 Enc. of Ev. 931; 118 Mich. 560; 42 L. R. A. 536; 45 Ark. 347; 58 Ark. 553; 70 Ark. 306; 61 Ark. 137.

U. L. Meade and *Davis & Pace*, for appellee.

1. The evidence shows beyond question that the engineer of the train saw deceased in time to have given the alarm by sounding the whistle and ringing the bell. The question for the jury to decide was whether or not the engineer exercised ordinary care, after he discovered the peril of the deceased, to prevent the injury. This, according to the evidence he failed to do. 87 Ark. 628.

2. Argument of counsel for appellee was justified by the evidence adduced, and in part invited by the conduct of counsel for appellant. The trial court heard the evidence and appellant's objections to counsel's argument, and overruled the same—and

properly so. No prejudice resulted. 95 Ark. 284; 90 Ark. 409; 91 Ark. 579; 23 Ark. 32; 34 Ark. 658; 20 Ark. 619; 66 Ark. 16. Remarks of counsel called forth by arguments and statements of opposing counsel can not be made the subject of complaint here. 77 Ark. 1; 95 Ark. 284. Unless some undue advantage has been secured by the argument of counsel which has worked a prejudice to the losing party not warranted by the law and the facts of the case, this court will not reverse. 74 Ark. 260. The trial judge can best determine at the time the effect of the argument before the jury, and a wide range of discretion must be accorded to him. 74 Ark. 259; 71 Ark. 406; 20 Ark. 619; 34 Ark. 649; 74 Ark. 489; 75 Ark. 67.

3. This court will not reverse for a mere formal defect in an instruction, especially where no specific objection thereto has been urged in the lower court. 65 Ark. 255; 76 Ark. 348; 76 Ark. 468.

McCULLOCH, C. J. David F. Evans was struck and killed by one of defendant's trains while he was asleep near the track, in the night time, with his head resting on or near the end of the cross-ties. His administrator instituted this action to recover damages on account of alleged negligence of defendant's servants in charge of the train, and on a former trial of the case the circuit court instructed the jury to return a verdict in favor of defendant. Plaintiff appealed, and this court reversed the judgment and remanded the cause for a new trial, holding that there was sufficient evidence to go to the jury on the question of negligence of defendant's servants in failing to give proper signals to awaken said decedent and warn him of the approach of the train. In disposing of the case here, this court said:

"The failure of the engineer to use the instrumentalities placed at his hands for the purpose of warning persons on the railroad track of the near approach of a train created a condition from which reasonable minds might draw different conclusions. In other words, the jury might have found negligence from his failure to give the usual danger signals. We are of the opinion that the testimony was sufficient to submit the question of negligence in this respect to the jury." *Evans v. St. Louis, I. M. & S. Ry. Co.*, 87 Ark. 628.

The case was again tried on substantially the same testimony. Plaintiff recovered judgment for damages in the sum of \$1,500, from which the defendant prosecutes this appeal. It is unnecessary to set forth the facts in detail, for they are fully set out in the former opinion of this court; nor is it necessary to discuss them, as this court has already held that they were sufficient to sustain a verdict in favor of plaintiff.

It is insisted that the fourth instruction given at the instance of plaintiff assumed that it was negligence on the part of the engineer to fail to ring the bell or blow the whistle after discovering deceased ahead in close proximity to the track. The instruction referred to is somewhat ambiguous, and might be construed as an assumption that the failure to give signals constituted negligence; but, when read in connection with the other instructions in the case, it is not at all probable that the jury so understood it, for the question of negligence was clearly submitted for their determination. In this condition of the record, and in the absence of a specific objection to the fourth instruction, we cannot say that it was error which calls for a reversal. *Brinkley Car Works & Mfg. Co. v. Cooper*, 75 Ark. 325.

Error is assigned in the refusal of the court to give the following instruction, and another of like import: "You are instructed that if defendant's engineer saw the deceased some distance ahead in time to have stopped the train, but believed in good faith that deceased was in no danger of being injured, and, under that belief, proceeded without attempting to stop his train or to give any alarm until the train was so near to the deceased that it was impossible to stop the train, the defendant would not be liable, and your verdict should be for the defendant."

This instruction was properly refused, for it incorrectly laid down good faith on the part of the engineer as a test of ordinary care. Good faith marks the distinction between wilfulness and unintentional neglect, but it is not a proper test of ordinary care or negligence.

There are numerous objections and exceptions to remarks of one of plaintiff's counsel, made in the closing argument. Many of the remarks were highly improper, and called for a severe rebuke by the court, but we are unable to see how there could

have been any prejudicial effect from any of the remarks, and that is the test when we come to determine whether or not a judgment should be reversed.

One of the objections was to statements of counsel as to the distance the engineer first discovered the sleeping man ahead of the engine. There was some evidence sufficient to form a basis for the remark and to justify the conclusion which counsel drew as to the distance; therefore there was nothing improper in the argument. It was a mere expression of counsel's opinion as to what the evidence established in this respect.

We conclude that the case was fairly tried, and that the verdict rests upon sufficient evidence; so the judgment is affirmed.

HART, J., (dissenting.) I think the court erred in giving instruction No. 4, which is as follows:

"Locomotives of railroad trains are equipped with bell and whistle for sounding danger signals; and it is admitted that those in charge of the train did not ring the bell or blow the whistle after the presence of the deceased was discovered; and if the jury believe, under all the facts and circumstances proved in the case, that those in charge of said train failed to exercise ordinary care, being such care as a person of ordinary prudence would exercise under similar circumstances, by negligently failing to ring said bell or blow said whistle for the purpose of warning deceased of the near approach of the train, and such failure to use due care caused or contributed to death of plaintiff's intestate, you will find for the plaintiff."

The instruction was peremptory in its nature, and in effect told the jury that the appellant was guilty of negligence if its engineer failed to ring the bell or sound the whistle. It will be noted that the instruction singles out a certain fact, and tells the jury that, if that fact existed, the appellant was guilty of negligence. As I understand our former opinion, the fact that the engineer failed to ring the bell or sound the whistle was to be considered, together with all the other facts and circumstances connected with the happening of the accident, in determining whether appellant was guilty of negligence.

COOK v. STATE.

Opinion delivered November 21, 1910.

CARNAL ABUSE—PROFERT OF INFANT.—In a prosecution for carnal abuse of a female under 16 years it was not error to permit the prosecutrix to produce her child before the jury, to testify as to the date of its birth, and that it was the result of intercourse with defendant.

Appeal from Calhoun Circuit Court; *George W. Hays*, Judge; affirmed.

Poole & Whitehead and *Davis & Pace*, for appellant.

In a prosecution of this kind where the only questions at issue are the age of the prosecutrix and the fact of the intercourse, the production of the child of the prosecutrix witness before the jury is improper. It can serve no purpose except to prejudice the minds of jurors, and does not tend to corroborate her testimony, either as to the fact of her intercourse with the defendant or as to her being under age at the time. 65 S. W. 375; 39 S. W. 684; 72 Ark. 411.

Where incompetent testimony is introduced which has a tendency to disparage controverting evidence on the part of the defendant, its admission is prejudicial. 74 Ark. 489; 91 Ark. 560; 67 Ark. 605; 69 Ark. 139; 70 Ark. 308.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

There was no error in permitting the child of the prosecuting witness to be exhibited to the jury. 84 Ark. 199; 93 Ark. 260.

FRAUENTHAL, J. The defendant, Ben Cook, was adjudged guilty of the crime of carnal abuse, committed upon the person of Ruth Strickland, a female under the age of 16 years; and he has appealed to this court, seeking to obtain a reversal of the judgment of conviction. The chief ground set out in his motion for a new trial, and the sole assignment of error pressed by his counsel upon this appeal, why the judgment should be reversed is that the lower court committed error in permitting the exhibition to the jury of the child that was alleged to have been conceived from said intercourse. We have examined the record in this case, and we think that there was sufficient testimony adduced at the trial to warrant the jury in finding that the de-

fendant had sexual intercourse with the prosecuting witness on divers occasions from December 25, 1907, to May, 1908, and that during all said time the prosecutrix was under the age of 16 years. As a result of said intercourse she testified that a child was born to her on December 8, 1908; and the case was tried in the lower court about 18 months after the birth of the child. At the trial she had the baby in her arms while she was giving her testimony. She testified that the baby was the result of the intercourse with defendant, and gave the date of its birth. The defendant objected to the production of the child before the jury and to her testimony relative to it and its age. Upon her cross examination by defendant's counsel, she was asked relative to the resemblance of the baby to persons other than the defendant, but she was not asked by the State any questions relative to its resemblance to the defendant or any other person. The character and extent of the testimony which by the State was introduced in this case relative to the child were similar to that introduced in the case of *Plunkett v. State*, 72 Ark. 409, in which it was ruled that no error was thereby committed by the lower court. In that case, while the prosecuting witness was testifying, she had her baby in her lap, and the defendant asked to exclude the baby from the presence of the jury, which was refused. In that case it was said that the production of the child of the prosecutrix was competent to prove her intercourse with some one; and while it did not rule on the question as to whether or not testimony as to the resemblance of the baby to the defendant was competent, because such testimony was not in the record, and while it made no mention of the fact that the jury by profert of the baby could determine whether or not there was such resemblance, it did hold that the court did not err in permitting it to be exhibited to the jury. In the case at bar the prosecutrix testified that her baby was the result of the intercourse with defendant, but that was in effect the testimony of the prosecutrix in the *Plunkett* case. In neither case did the witness give testimony tending to show that the defendant was the father of the child by reason of the resemblance of it to the defendant.

We are of the opinion that this assignment of error is ruled by the *Plunkett* case; and the court did not commit error in permitting the production of the child before the jury or

in permitting the witness to testify as to the date of its birth, and that it was the result of the intercourse with defendant. We do not think it therefore necessary to pass upon the question as to whether or not it was competent to introduce testimony of witnesses as to the resemblance of the baby to the defendant or to comment upon such resemblance.

It has been held by this court that in a bastardy case it was not error to permit the child to be exhibited to the jury. *Land v. State*, 84 Ark. 199. In that case it was said that it would be necessarily inferred that the purpose of the prosecution in making exhibition of the child was to allow the jury to observe whether or not the child bore any resemblance to the putative father.

In the case of *Adams v. State*, 93 Ark. 260, which was a prosecution for seduction, it was held by this court that the child could be exhibited in the trial for the same purpose. In the case of *State v. Danforth*, 73 N. H. 215, there was a prosecution for "rape upon a woman child under the age of 16 years," which is a crime similar to that with which the defendant is charged in the case at bar. In that case the prosecution was permitted to exhibit the child to the jury and to argue from a peculiarity of features common to both and from a general resemblance between them that the defendant was the father of the child. And in that case it was said that the objection urged to such testimony was rather to its weight than to its competency.

There is no little conflict in the authorities as to whether or not it is competent to introduce testimony relative to the resemblance between the child and defendant in cases of bastardy, seduction, carnal abuse and the like, but the weight of authority seems to be in favor of holding that it is permissible to make exhibition of the child to the jury and to introduce testimony as to such resemblance. The purpose in all these cases is the same; that is, to show the paternity of the child. See note to *State v. Harvey*, 52 L. R. A. 500.

But it has been uniformly held that it is competent to prove the date of the birth of the child, in order to show that it might have been begotten at or about the date of the offense charged, and that the child may be exhibited to corroborate such evidence.

There are other assignments of error set out in the motion for a new trial, but these have not been urged upon this appeal. We have examined each of these, but we do not find that any prejudicial error was committed in the trial of the case.

The judgment is accordingly affirmed.

BATES v. MITCHELL.

Opinion delivered November 28, 1910.

1. APPEAL FROM JUSTICE OF THE PEACE—DELAY IN PERFECTING.—Where a party appeals from a judgment of a justice of the peace, but neglects to file the transcript in the circuit court on or before the first day of the next term, in the absence of any showing of diligence on his part or excuse for delay, the appeal should be dismissed or the judgment affirmed. (Page 556.)
2. SAME—APPEARANCE AS WAIVER OF DELAY.—Where the plaintiff prayed an appeal from a judgment of a justice of the peace, but delayed filing his transcript in the circuit court until after the first day of the next term, defendant did not waive such delay by filing a motion to dismiss the appeal on that ground. (Page 556.)

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; affirmed.

Rice & Dickson and *J. A. Rice*, for appellant.

McGill & Lindsey, for appellee.

McCULLOCH, C. J. Bates sued Mitchell on account before a justice of the peace, and recovered judgment for the amount of his account. The judgment was rendered on November 20, 1909, and Bates on the same day filed his affidavit for appeal to the circuit court. The next term of the circuit court began on March 21, 1910, and the transcript of the proceedings was not filed therein until April 12, 1910. On the next day Mitchell filed a motion to dismiss the appeal on account of the failure to file the transcript on the first day of the term as required by statute, and on the same day Bates filed a motion to transfer the case to the chancery court, alleging that a case was then pending in that court between the same parties involving the

account sued on. The only testimony adduced at the hearing of the motion to dismiss the appeal was that of the justice of the peace, who testified that when the affidavit for appeal was filed the defendant's attorney stated that he "wanted to appeal," but did not ask for the transcript until April 11, 1910, the day before it was filed in the circuit court. The court overruled the motion to transfer to equity, and dismissed the appeal. Bates appeals from that order.

It was the duty of appellant to see that his appeal was perfected in time; and when no diligence on his part was shown, nor excuse for the delay, the appeal should have been dismissed, or the judgment of the justice of the peace affirmed. *Smith v. Allen*, 31 Ark. 268; *McGehee v. Carroll*, 31 Ark. 550; *Hughes v. Wheat*, 32 Ark. 292; *Wilson v. Stark*, 48 Ark. 73. No excuse for the delay is shown in the present case.

There was no general appearance by appellee, so as to waive the delay in perfecting the appeal. The motion to transfer to equity and the motion to dismiss the appeal were filed on the same day, and were heard together by the court. Appellee insisted on his motion to dismiss, and at the same time resisted the motion to transfer. This was not a general appearance nor an abandonment of his motion.

Judgment affirmed.

RICHESON v. NATIONAL BANK OF MENA.

Opinion delivered November 28, 1910.

LIENS—INSOLVENT CORPORATION—ASSIGNMENT.—The preference given by Kirby's Digest, § § 949, 950, to laborers and employees in winding up the affairs of an insolvent corporation is personal, and not assignable.

Appeal from Polk Chancery Court; *W. H. Collins*, Special Chancellor; affirmed.

Willard P. Cave, for appellant.

The claim to priority for wages was not defeated by the assignment of the account. 19 Am. & Eng. Enc. of L. 2d Ed. 25; 2 *Id.* 1052, note Laborers' Liens; 18 Wall. 659; 104 Cal.

10; 36 Me. 384; 54 Miss. 286; 60 Ala. 448; 83 Ala. 266; 1 Jones on Liens, ¶ 990; *Id.* § 991; 37 Ark. 511; 71 Me. 113; 36 Am. Rep. 299; 31 Me. 134; 4 Cyc. 72; 107 U. S. 596; 111 U. S. 776; 25 Cyc. 678.

Wright Prickett and Elmer J. Lundy, for appellee.

The lien was personal, and could not be assigned. 27 Ark. 564. The statute is intended as a protection to the laborer who actually does the work, and to him only, and the person claiming the lien must bring himself strictly within the statute. 71 Ark. 334; 54 Ark. 522; 43 Ark. 168; 65 Ark. 183; 69 Ark. 23; 59 Ark. 81; 80 Ark. 516; *Id.* 197; 84 Ark. 126; 145 Ind. 624; 44 N. E. 632; 90 N. E. 73.

McCULLOCH, C. J. The question involved in this appeal is whether or not the right of an employee of an insolvent corporation to have his claim for wages or salary paid in preference to the claims of general creditors of such corporation is assignable before it is filed and the preference fixed by the order of the court. The statute conferring the preference right reads as follows:

"Sec. 949. No preferences shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employees.

"Sec. 950. Any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporation, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors after paying the wages and salaries due laborers and employees."

If this statute be construed as creating a lien, there is a conflict in the authorities as to whether such statutory lien passes with an assignment of the debt; but it is clearly settled by the decisions of this court that such a lien is personal, and does not pass with an assignment of the debt. The decisions referred to relate to liens of laborers and material men and to landlords. *Dano v. M. O. & R. R. Rd. Co.*, 27 Ark. 564; *Roberts v. Jacks*, 31 Ark. 597; *Nolen v. Royston*, 36 Ark. 561; *Varner v. Rice*, 39 Ark. 344.

But the language of the statute under consideration makes it very plain that the preference right is personal to the laborer

or employee, and does not pass with an assignment of the debt. The statute merely declares that in winding up an insolvent corporation the assets shall be distributed equally among the creditors "after paying the wages and salaries due laborers and employees."

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY
v. JONES.

Opinion delivered November 28, 1910.

1. RAILROADS—AUTHORITY OF CONDUCTOR.—The authority of a railway train conductor extends merely to the control of the movements of his train and to the immediate direction of the movements of the employees engaged in operating the train, and does not ordinarily extend to making contracts on behalf of the railway company. (Page 561.)
2. SAME—AUTHORITY OF CONDUCTOR TO MAKE CONTRACTS.—In order that contracts made by a railway conductor may be obligatory upon the railway company, they must be made to enable him to perform the duties required of him, and must not relate to collateral matters, nor be outside of the line of duty assigned him, and there must be a necessity for immediate action. (Page 562.)
3. SAME—AUTHORITY TO EMPLOY HELP.—In the absence of any emergency the conductor of a freight train has no authority to employ any person to perform the duties usually performed by the brakeman, and such employment would not be binding upon the railway company. (Page 563.)
4. SAME—LIABILITY TOWARD VOLUNTEER.—One who sues the railway company for injuries received in the operation of a train while acting as brakeman under employment by the conductor is not entitled to recover where it is not shown that the conductor had authority, express or implied, to employ him, as he is neither a passenger nor an employee but a mere volunteer who assumed the risks of the situation in which he placed himself. (Page 563.)
5. SAME—WHEN BOUND BY CUSTOM.—To bind a railway company by proof of a custom of permitting persons to ride upon local freight trains in consideration of services performed by them in loading and unloading freight, there must be also proof that the custom was known to the officials who conducted the affairs of the railway company or that it was so general and of such long continuance that it must be inferred that it was assented to by them. (Page 564.)

Appeal from White Circuit Court; *Hance N. Hutton*, Judge; reversed.

STATEMENT BY THE COURT.

Lindsay Jones, by N. A. Ford, his mother and next friend, brought this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries received by him while attempting to board one of defendant's local freight trains.

Lindsay Jones testified in his own behalf, and stated the circumstances connected with the happening of the accident substantially as follows:

He was a white person, and was 19 years old when he was injured. He had been at Bald Knob, a station on defendant's line of railroad in Arkansas, hunting work. He ran out of money, and, failing to obtain employment, he decided to return home. Higginson was the station on defendant's line of road nearest his home. He asked the conductor of one of defendant's local freight trains if he would let him ride and work his way to Higginson. The conductor answered: "I will see about it directly;" and directly came back and said: "Get on; you can work your way." The first stop was made at Judsonia, and he helped load and unload some freight. The conductor was standing around while the freight was unloaded. The next stop was at Kensett. Jones worked there, helping to load and unload the freight. While he was carrying a piece of freight from one of the cars to the freight house, the train without notice or warning of any kind was put in motion. Jones, after depositing the piece of freight in the freight room, turned around to get on the departing train. The train was running, and Jones reached up to get the handle of the front end of the caboose to get on it. His foot slipped and fell under the wheels of the caboose. It was mashed so badly that it was necessary to amputate it.

On the part of the defendant, it was shown that the conductor had no authority to employ any one to assist the train crew in the operation of the train, or in loading or unloading freight.

The conductor on behalf of the defendant testified that he did not contract with the plaintiff to carry him from Bald

Knob to Higginson in consideration of any services performed by him. He did testify to the fact that he saw the plaintiff on the train, and that he intended to collect his fare later, but that he overlooked or neglected to take up his fare.

On cross examination, in response to the question: "Isn't it a fact that people are carried free by the conductors on the local freight trains up and down the Iron Mountain road to assist the crew in the loading and unloading of freight at the stations?" he answered, "Colored men only."

The jury returned a verdict for the plaintiff, and from the judgment the defendant has duly prosecuted an appeal to this court.

W. E. Hemingway, E. B. Kinsworthy and James H. Stevenson, for appellant.

1. The verdict is contrary both to the law and the evidence. (1) The state of facts related by appellee, if true, did not make him a passenger. 95 S. W. 116; *Id.* 200; 58 Ark. 318, 323; 165 Fed. 403; 19 L. R. A. (N. S.) 988, 989, 991; 67 Fed. 522; 28 L. R. A. 749, 752; 93 S. W. 104; 5 L. R. A. (N. S.) 1025; 4 *Id.* 1027; 71 Miss. 70. Even if he had been a passenger, in running after the train he ceased to be such, since a person who wilfully waits until a train starts and then runs after it is not a passenger while so pursuing it. *Hutchinson on Carriers*, § 1006, p. 1161; 58 Ga. 461; 66 Ga. 764; 31 Ill. App. 460. (2) There was no breach of any duty appellant owed appellee. If he was not a passenger, and if by his own act he contributed to his injury, appellee is not aided by any presumption of negligence, but must prove it. 37 Ark. 136, 141; 69 Ark. 380; 62 Ark. 235; 86 Ark. 307; 82 Ark. 522. Since his own evidence showed that he was guilty of contributory negligence, the burden of proof shifted to appellee. 3 *Hutchinson on Carriers*, § 1417; 89 Ala. 247; 31 Neb. 796, 48 N. W. 890; 85 Ga. 653; 11 S. E. 872; 76 S. W. 232; 63 S. W. 1089. (3) The appellee was guilty of contributory negligence, as a matter of law, in attempting to board a rapidly moving train. 54 Ark. 25; 3 *Hutchinson on Carriers*, §§ 1170-1182, and cases cited; *Thompson on Negligence*, § § 3000-1; 76 Ark. 10; 3 *Hutchinson, Carriers*, § 1420.

2. Appellee was neither a passenger nor an employee, but was a trespasser, and the only duty appellant owed him was not to wantonly injure him, or to exercise care not to injure him, if his peril was discovered in time to prevent such injury. 90 Ark. 278; 57 Ark. 461; *Id.* 136.

S. Brundidge, Jr., for appellee.

1. The conductor being in charge of the train with full right to receive and discharge passengers, and the uncontradicted proof showing that he did receive appellee into the caboose, the latter was a passenger. 14 N. E. 198; 107 Mass. 107; 10 S. W. 487; 58 Me. 187; 91 Mo. 344; 72 Mo. 63; 30 Ill. 9; 35 Kan. 185. It is immaterial whether he paid any fare or not. 21 Am. & Eng. R. Cas. 152; 42 *Id.* 409; 79 Texas 371; 143 Fed. 834; 43 Mo. App. 342; 96 Pa. St. 256.

2. The employees in charge of the train, knowing that appellee was off the train assisting in the movement of freight, and that at their invitation, owed him, at the least, the duty to afford him a safe means of ingress into the caboose. In starting the train prematurely and without warning, appellant failed in this duty and was guilty of negligence. 68 Texas 370; 33 Am. & Eng. R. Cas. 543; 49 N. Y. 673; 100 Mo. 194; 75 Mo. 475; 98 Cal. 566; 97 Cal. 114; 66 Ga. 746.

3. Under the circumstances of this case, considering his youth, inexperience and ignorance, it was not contributory negligence for the plaintiff to attempt to board the train. 117 Fed. 127; 91 Ark. 108; 78 Ark. 260; 71 Ark. 55; 60 Ark. 549; 92 Ark. 444; 81 Ark. 187; 38 N. E. 578; 71 N. E. 985.

HART, J., (after stating the facts). It is the contention of the plaintiff that he made a contract with the conductor of one of the defendant's local freight trains to carry him from Bald Knob to Higginson in consideration of services to be performed by him in assisting the train crew in loading and unloading freight.

The undisputed evidence shows that the conductor did not have express authority to make such contract. Did he have implied authority to make it? The general rule is that the agent has the implied authority to do all things which are reasonably necessary to effectuate the main purpose for which he is employed.

Mr. Elliott says that the authority of the conductor ordinarily extends to the control of the movements of his trains and to the immediate direction of the movements of the employees engaged in operating the train; and does not extend to making contracts on behalf of the railway company. 1 Elliott on Railroad, § 302.

Continuing, the author says: "As we have said, the conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties. In order that contracts made by him shall be obligatory upon the company, they must be made to enable him to perform the duties required of him, and must not relate to collateral matters nor be outside of the line of duty assigned him. Thus, he may, where other provision has not been made, employ mechanics to repair a break of the cars or machinery which must be repaired before the train can proceed to its destination, and may engage men and teams to render the roadway or bridges secure for the passage of his train, when weakened or partially swept away by unforeseen causes; but in such cases the authority to contract does not exist unless there is necessity for immediate action. It is the necessity which confers the authority, not simply the position of conductor." 1 Elliott on Railroads, § 302.

In the case of *Eaton v. Delaware, etc., Ry. Co.*, 57 N. Y. 382, it is said: "There is nothing in the business of a conductor which would lead to the conclusion that he had authority to make contracts with persons to act as brakemen. His apparent duties are to carry forward a train after it is organized. The business of organizing it is in its nature wholly distinct. It is, in fact, committed to a train dispatcher." In *Cooper v. Lake Erie, etc., Ry. Co.*, 136 Ind. 366, 36 N. E. 272, the court said:

"While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of the appellant. * * * No custom, rule or regulation of the appellee company is shown by which the appellant might pay his way by working on the train, assisting

the brakeman or other employee. * * * At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to receive him. Any dangers to which he might become exposed were wholly at his own risk. The company would be liable only for wilful injury to him." As bearing upon the question and recognizing this principle, we also cite the following: *Church v. Milwaukee & S. P. Ry. Co.*, 50 Minn. 218; *Louisville & N. Ry. Co. v. Ginley*, 45 S. W. (Tenn.) 348; *Everhart v. Terre Haute & Ind. Rd. Co.*, 78 Ind. 292; *Rhodes v. Georgia Rd. & Banking Co.*, 84 Ga. 320; *Vassor v. Atlantic Coast Line Rd. Co.*, 142 N. C. 68, 9 Am. & Eng. Ann. Cas. 535.

This principle was recognized and applied by this court in the case of *Railroad Company v. Dial*, 58 Ark. 318. The court held (quoting syllabus): "Where a boy 15 years of age, at the request of the conductor of a freight train, undertakes to throw off the brake on a car, and is injured by striking his head on an iron bridge, he can not recover from the railroad company on account of its negligence in failing to warn him of the danger if the conductor had no express or apparent authority to employ him, and there was no exigency which called for the exercise of implied authority."

It is not claimed that there was any sudden or unexpected emergency which made it necessary for the proper operation or safety of the train for the conductor to employ the plaintiff. There is no evidence that the injury was wanton or wilful.

Applying the general principles above announced to the facts of this case as testified to by the plaintiff himself, and upon which he bases his right of recovery, it is apparent that he is neither a passenger nor employee. He bases his right to recover wholly upon the contract made with the conductor. He testified that he was performing the services usually performed by brakemen while making the trip. He could not be engaged in the immediate and direct duties of a servant and at the same time be considered a passenger. He was not an employee because the conductor had no authority, express or implied, to make the contract of employment. He was a mere volunteer, and as such assumed the risks of the situation in which he placed himself.

There was an attempt made to prove by the cross examination of the conductor the existence of a custom whereby persons were permitted to ride upon local freight trains in consideration of services performed by them in loading and unloading freight. The conductor says this applied to colored men only. But, in order to make the company liable, there must be proof, not only of the custom, but that it was actually known by the officials who conducted the affairs of the railway company, or that it was so general and of such long continuance that it must be fairly inferred that it was known and assented to by them. *Railway Company v. Bolling*, 59 Ark. 395. It might be inferred from the evidence of the conductor in this case that he allowed plaintiff to ride without collecting his fare; that he, the conductor, intended later to collect it; but that he overlooked it, or neglected to collect it, owing to his mind being occupied with other duties. But, whatever would be the rights of a person riding gratuitously in a coach provided for passengers by permission of the conductor without any evidence of his right to do so, such as a pass, that question has passed out of the case; for plaintiff was not injured while on the train; but, according to his own testimony, he had left the train, and was injured while attempting to re-enter it and be carried according to the terms of the contract which we have held the conductor had no authority, either express or implied, to make.

It follows that the court should have directed a verdict for the defendant as requested by it; and for the error in not doing so the judgment must be reversed, and the cause will be dismissed.

KIRBY, J., dissents.

BELL v. CASTELBERRY.

Opinion delivered November 28, 1910.

1. ACKNOWLEDGMENTS—CONCLUSIVENESS.—Where a grantor appears and makes an acknowledgment before an officer authorized to take acknowledgments, the recitals of the officer's certificate, regular on its

face, are, in the absence of fraud or duress, conclusive of the facts therein stated. (Page 566.)

2. SAME—FRAUD—BURDEN OF PROOF.—The burden of showing that a certificate of acknowledgment of a deed was procured by fraud or duress rests upon him who attacks such certificate, and the evidence to sustain such charge of fraud or duress must be clear, cogent and convincing. (Page 566.)
3. SAME—PROOF OF FRAUD.—Testimony of a married woman that she acknowledged her husband's deed because she was told that only by doing so could she get anything for the land is insufficient to prove that her acknowledgment was procured by fraud or duress. (Page 566.)

Appeal from Ouachita Chancery Court; *J. M. Barker*, Chancellor; affirmed.

Thornton & Thornton, for appellant.

Gaughan & Sifford, for appellee.

FRAUENTHAL, J. This was an action instituted by appellee to reform a deed which had been executed to him by appellant and her husband. It was alleged that by mistake the land was incorrectly described in the deed; and the purpose of this suit was to obtain a correction of this description. The land was the property of the husband, who sold same to appellee in 1902 upon a credit of five years, and executed to him at the same time a bond for title for the land, and placed him in possession thereof. The appellee remained in possession of the land from that date to the time of the institution of this suit. In 1908 an agreement was reached as to the amount which appellee owed on the purchase money of the land, and this amount was left at a bank to be paid over to the grantor upon the due execution of a deed for the land. The appellant and her husband went to this bank, and there signed, acknowledged and delivered the deed over to the cashier of the bank for appellee, and the purchase money therefor was then paid to the husband. It is conceded that the mistake alleged in the complaint was made in the description of the land as set forth in the deed, and the husband has made no objection or defense to the reformation thereof. The appellant admitted that the mistake was made in the description of the land, but she alleged that she did not join in the execution of the bond for title, and that she did not sign the deed of her own free will, but that her signature

and acknowledgment thereto was obtained by coercion and undue influence of her husband.

It appears from the testimony that appellant signed the deed, and actually appeared and acknowledged same before a notary public. The certificate of the notary public is regular on its face; and therein the notary public certified that she appeared before him voluntarily and in the absence of her husband declared that she had of her own free will executed the deed and signed and sealed the relinquishment of dower and homestead therein without compulsion or undue influence of her husband; and he testified upon the trial of this case that she signed the deed and acknowledged same in the manner as set forth in said certificate.

It is a rule well settled by authority and several times announced by this court that where a grantor appeared and made some kind of an acknowledgment before an officer authorized by law to take such acknowledgment the recitals of the certificate of such officer, regular on its face, are, in the absence of fraud or duress, conclusive of the facts therein stated. *Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421; *Petty v. Grisard*, 45 Ark. 117.

The burden of showing such fraud, imposition or duress rests upon him who attacks such certificate, and the evidence to sustain it must be clear, cogent and convincing so as to satisfy the mind beyond reasonable controversy that the execution and acknowledgment of such a solemn instrument was obtained by imposition or duress.

In the case of *Bank v. McCarty*, 149 N. Y. 71, the court stated its conclusion on the subject in the following language: "The rule governing the action of trial courts as well as appellate courts with power to review the facts seems to be uniform in all the States to the extent of requiring that a certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty." It is not claimed that any fraud was committed or undue influence exercised upon the appellant in obtaining her signature and acknowledgment to the deed by the appellee or the officer taking the acknowledgment. It

is only urged that the coercion was exercised by the husband. But, upon an examination of the testimony of the appellant herself, we do not think that influence was exerted upon her by her husband which amounted to coercion. She testified that she lived about four miles from the town of Bearden in which the bank was located where the deed was signed and acknowledged, and that she went there with her husband in order to sign the papers. She did not state that her husband used any word or act of intimidation or coercion to get her to go to Bearden. Her entire testimony relative to any force exerted upon her to get her to go to Bearden was as follows:

"Q. Were you forced to go to Bearden? A. Yes, sir. They had told us that we only had three days' grace to sign the deed in or we couldn't get anything at all. Q. That is what you mean by saying you were forced to go, for unless you signed the deed you would get nothing? A. Yes, sir. Q. You knew that if you didn't sign the deed you would get nothing? That is the reason why you signed the deed? A. Yes, sir; I guess so. I had to sign it to get anything at all."

She further stated that at the time she made acknowledgment of the deed she had to speak to the officer in a loud tone of voice on account of the impairment of his hearing, but she did not say that she told him that she did not sign the deed of her own free will. She stated that he could tell that because she had tears in her eyes, but in the same connection she said that she did not want to execute the deed and the reason why she did so was: "We could not get anything without signing it; we had to do something."

Under this testimony of appellant we do not think that any fraud was practiced or coercion exercised upon her to obtain her signature or acknowledgment to the deed. She stated that she knew that her husband had sold the land involved in this suit to appellee, and that he had been in the possession of it under that purchase for six years prior to the execution of the deed, and that she and her husband went from their home to Bearden for the purpose of executing the deed. She stated that she signed the deed and made acknowledgment to it in order to get the money which was paid therefor; and in truth this appears to be the only coercion upon her will in the procurement of her signature and acknowledgment thereto, accord-

ing to her testimony. She was unwilling to sign the deed; but, inasmuch as she could not get the money therefor without signing it, she permitted her great desire for the money to overcome her will. This was not an undue influence exerted upon her or an involuntary act upon her part, within the meaning of the statute regulating the execution or acknowledgment of deeds by married women. The statute does not require that she shall execute it without motive or as a mere act of generosity; but that she shall execute it on account of acts of intimidation or coercion by her husband or from fear of injury from him, before it can be said that she executed it through compulsion or undue influence on his part.

Under the testimony adduced in this case we can not say that appellant was compelled to sign or acknowledge the deed by reason of any undue influence exercised upon her. This conclusion results in the affirmance of the decree of the lower court. We do not deem it necessary, therefore, to discuss or determine the further question raised by appellee: that his rights can not be affected by the alleged undue influence of the husband because there is no testimony adduced upon the trial of the case showing that appellee knew or had notice of any such imposition or fraud.

The decree is affirmed.

BEASLEY v. HANEY.

Opinion delivered November 28, 1910.

1. GARNISHMENT.—CONSTRUCTION OF STATUTE.—As garnishment statutes are in derogation of the common law, garnishment proceedings must pursue the provisions of the statute strictly. (Page 570.)
2. SAME—CONCLUSIVENESS OF GARNISHEE'S ANSWER.—The answer of a garnishee must be taken as *prima facie* true; and if not contradicted, or if no issue is taken thereon, it will be presumed to be absolutely true. (Page 571.)
3. SAME—PLEADINGS AND PROCEDURE.—The pleadings in a garnishment proceeding and the mode of trial thereof are governed by the same rules that apply to the pleadings and trials in other cases. (Page 571.)
4. PLEADINGS—OBJECT.—The object of pleadings is to apprise each party of what is admitted and what he is required to establish by testimony. (Page 571.)

5. GARNISHMENTS—PLEADINGS.—In a garnishment proceeding in the circuit court, the plaintiff's denial of the garnishee's answer is a pleading, and cannot be oral. (Page 571.)

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; reversed.

L. A. Byrne, for appellant.

1. It was error to include several garnishees in one writ without alleging a joint liability or indebtedness. 17 Ark. 364; 37 Ark. 478.

2. It was error to proceed to trial and judgment without first an issue being raised as to the allegations in the answers of the garnishees, and notice thereof given to them. *Kirby's Digest*, § 3700; 19 Ark. 241; 48 Ark. 349; 67 Ark. 347.

FRAUENTHAL, J. This is an appeal from a judgment entered against the appellants upon a writ of garnishment sued out upon a judgment which had been previously recovered in favor of appellee and against one W. C. Taylor. On April 7, 1908, appellee recovered judgment against said defendant in the Benton Circuit Court; and thereafter he filed in that court a complaint in which he alleged that H. V. Beasley, one of the appellants, and other parties were severally indebted to the defendant, and therein also propounded interrogatories to be answered by said garnishees. A writ of garnishment was thereupon issued in the usual form, and therein all said parties were summoned as garnishees, but it was stated in said writ that it was alleged that the said parties were severally indebted to the defendant. Upon the return day of said writ each of said parties filed separate answers to the allegations and interrogatories. Thereafter the appellee obtained leave of the court to file an amended complaint in which additional allegations were made against said Beasley, who subsequently filed his answer thereto. At the same time the appellee was by the court allowed to file an amendment to the original complaint in which allegations were made against and interrogatories propounded to the appellant Mrs. W. C. Taylor, and thereupon a writ of garnishment was issued against and served upon her, and later she filed an answer thereto. At a term of the Benton Circuit Court subsequent to the time of the filing of the answer of Mrs. Taylor, and at a day of the term of said court sub-

sequent to the filing of the answer of Beasley, said court discharged all the parties, garnishees, upon their answers, except said Beasley and Mrs. Taylor. As to them the judgment states that "the plaintiff entered his denial to the separate answer of H. V. Beasley and the separate answer of Mrs. W. C. Taylor, and caused his denial to be entered on the record," and thereupon the court, sitting as a jury, proceeded to try the matters or causes of garnishment against said two garnishees, and rendered judgments against them for the amount of the original judgment which had been obtained against the defendant. It appears that at the time of said trial neither of said garnishees was present, nor was either of them notified that any denial had been made to the said answers. It appears further that the plaintiff did not file any written denial of the answers, nor did he file any written pleading traversing any of the allegations or denials set out in the separate answers of said garnishees.

From the judgment thus rendered against them the said garnishees have appealed by suing out a writ of error from this court.

The controlling question involved in this case is whether or not the lower court committed error in proceeding to a trial of the garnishments before the plaintiff had filed any written denial to or pleading traversing the answers of the garnishees. The garnishees did not waive this requirement, if it was necessary, nor did they consent to a trial without it being complied with, because neither of them was present at the time, but the trial was had and judgment entered against them wholly in their absence and without their knowledge. The remedy given by garnishment is purely statutory in its nature. As is said in the case of *Trowbridge v. Means*, 5 Ark. 135, "such statutes are all in derogation of the common law, and have generally received a strict construction." To make the same effective, it is necessary that the proceeding by garnishment be pursued according to the provisions of the statute. 9 Enc. Plead. & Prac. 809; Rood on Garnishment, § 352.

It is provided by our statute that a judgment creditor may sue out a writ of garnishment against any person who, he has reason to believe, is indebted to or who has in his possession goods and chattels, moneys, credits and effects belonging to the

defendant. Kirby's Digest, § 3694. By section 3699 of Kirby's Digest it is provided that: "Such garnishee shall on the return day named in such writ exhibit and file under his oath full, direct and true answers to all such allegations and interrogatories as may be exhibited against him by the plaintiff."

After the garnishee has filed his answer the plaintiff must either except to or deny the allegations thereof. The answer of the garnishee is taken as *prima facie* true of the allegations it contains; and if it is not contradicted or if issue is not taken thereon, it will be presumed to be absolutely true. *Mason v. McCampbell*, 2 Ark. 506; *Britt v. Bradshaw*, 18 Ark. 530; Rood on Garnishment, § 313; 9 Enc. Plead. & Prac. 842; 20 Cyc. 1090. If, therefore, there is no denial or traverse of the allegations of the answer of the garnishee, he is entitled to be discharged; and there can be no issue joined thereon upon which a trial can be had until such denial is made by the plaintiff in the manner prescribed by the statute, unless the requirement is waived by the garnishee.

By section 3700 of Kirby's Digest it is provided that: "If the garnishee shall file his answer to the interrogatories exhibited, and the plaintiff shall deem such answers untrue or insufficient, he may deny such answer and cause his denial to be entered on the record; and the court or justice, if neither party require a jury, shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff." The pleadings in these garnishment proceedings and the mode of trial thereof are governed by the same rules that apply to the pleadings and trials in other cases. *Walker v. Bradley*, 2 Ark. 578; 9 Enc., Plead. & Prac. 844.

Under our Code all pleadings in the circuit court must be written, unless waived by the parties. By section 6085 of Kirby's Digest it is provided that: "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." The purpose of the pleadings is to arrive at the exact issue between the parties. Their rights require that the one party should set forth the facts upon which he bases his claim, and that the other should show the facts upon which he relies to defeat such claim. The object is to apprise each party of what is admitted and what he is required to establish by testimony. *Tyner v. Hays*, 37 Ark. 599; *Hecht v.*

Caughron, 46 Ark. 132; *Harvey v. Douglass*, 73 Ark. 221. When the garnishee files his answer, he therein alleges the facts and sets forth the denials upon which he bases his right to be discharged. And if the plaintiff desires to make an issue thereon he is required to file his denial, in which he must show what allegations of the answer he traverses and the facts upon which he relies to defeat the right of the garnishee to a discharge. The denial which the statute provides that the plaintiff must make to the answer of the garnishee is therefore a pleading, and, if the proceedings are pending in the circuit court, that pleading must be written. Thus in the case of *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446, an intervener filed his intervention for certain property which was attached under the proceedings in that case. It was therein held that it was necessary for the plaintiff to file an answer to such intervention, and that the answer could not properly be an oral one. And it was further held that it was error for the court to proceed to trial without requiring a written answer to the intervention. And so, in a garnishment proceeding in the circuit court, the denial by the plaintiff of the answer of the garnishee is a pleading, and can not properly be an oral one. In the case at bar the answers of the garnishees were not properly denied; and the court erred in permitting an oral denial thereof. In the absence of a written traverse of the answers of the garnishees there were no issues thereon joined for trial, and the court was in error in proceedings to a trial thereof before the issues were properly made. Upon this cause being remanded, the court may permit the plaintiff to file such pleadings as he may desire to make to the answers of the garnishees. *Lawrence v. Sturdivent*, 10 Ark. 133; *Bender v. Bridge*, 18 Ark. 593.

There are other errors assigned by appellants why the judgment should be reversed, but we do not think that their contention as to any of them is correct.

The judgments are reversed, and the causes remanded for a new trial.

HAYNES v. MONTGOMERY.

Opinion delivered November 28, 1910.

1. TRUST—PURCHASE OF WARD'S LAND BY GUARDIAN.—The law forbids a guardian to purchase the property of his ward directly or indirectly, and if he does so it permits the ward to have the sale set aside without a showing of actual fraud or injury. (Page 576.)
2. SAME—PURCHASE OF TRUST PROPERTY.—A purchaser of land from a guardian who had notice that the guardian had wrongfully acquired the land from his ward takes no better title than the guardian acquired. (Page 578.)
3. MARSHALING OF SECURITIES—WHEN REQUIRED.—Where a fraudulent purchaser of a ward's land conveyed it with other lands to an innocent mortgagee, the latter will be required to marshal the securities, so as to exhaust his remedy against the other tracts of land before resorting to the ward's land. (Page 579.)

Appeal from Randolph Chancery Court; *George T. Humphries*, Chancellor; reversed.

STATEMENT BY THE COURT.

This suit is by Leota Haynes, formerly Leota Arnold, for 80 acres of land, and for the canceling of certain conveyances of same, and for an accounting of the rents and profits.

Benjamin F. Arnold died in 1895 in Randolph County, leaving him surviving, appellant, his only child and heir, about five years old, who afterward married Haynes. His estate consisted of eight or ten head of cattle, a mule and wagon, some household goods, and the land in controversy, the northeast quarter of the northeast quarter of section 27, township 18 north, range 2 east, a part of which was in cultivation, and upon which a lien existed securing a debt of \$100. He was taken sick at the house of defendant, Montgomery, and, realizing that death was near and desiring to provide for his motherless girl as far as possible, made an agreement with Montgomery to take his cattle and all other personal property and the rent on farm for that year and pay the mortgage off the land, to take care of and raise the child, and to turn the land over to her when she became 18 years of age. "Montgomery said the agreement was that he was to take the child, and personal property and rent for the land that year, was to pay the land out, and save it for the child, and turn it over to her when she was 18 years old. He

was also to school the girl all he could," was his statement to the brother of the dead man, and is not denied by him.

Montgomery was duly appointed guardian of plaintiff, and the mortgage was foreclosed after a default decree was rendered against her guardian and herself, without the appointment of a guardian *ad litem* for her, and said Montgomery, at the sale by commissioner, procured said land to be bought in for him and his benefit by J. H. Imboden. The land only brought \$170, and the proof shows it to have been of the value of about \$600. L. A. Imboden, the executor of J. H. Imboden, conveyed same to Spinnenwebber, Peters & Hanff to hold for Montgomery, and they conveyed it to him by deed, dated October 3, 1907.

In furtherance of his scheme to procure title to said land in violation of his trust and to defraud the plaintiff of her rights, he procured the removal of disability of minority of plaintiff on September 4, 1907, that she might make a deed to perfect the title, and induced her to convey it to said firm, on the advice of his attorney, who procured the order that they might convey it to him; and a quitclaim deed was made on the same day, September 4, 1907. The expressed consideration was one dollar, and nothing whatever was ever paid plaintiff for said land.

This guardian had always, while plaintiff was growing up, spoken of this land as his, and told her she had no real interest in it; that he wanted to sell it and Mont. Armstrong would not buy it until she had the order of court removing her disability of minority and made the deed. The defendant, Montgomery, was in possession of the land from the time of Ben Arnold's death until January, 1908, and collected from \$40 to \$70 per year rent therefor.

The defendant, M. R. Armstrong, claims to be an innocent purchaser of this land from W. J. Montgomery, guardian of the plaintiff. The proof shows that he purchased it from him knowing that he was her guardian, and that the title to it was held by Spinnenwebber and Peters for him in violation of his trust as such guardian, and, after refusing, as Montgomery states, to buy it until plaintiff's disabilities were removed and a deed made from her, that he asked for the papers and examined the records, as he was interested in them and wanted them included in the abstract. This was all done before he paid the purchase money, or any part of it, on October 3, 1907, and before the

deed was executed by said Spinnenwebber and Peters to said Montgomery on that date. He required them to make affidavit before him as county clerk, showing, among other things, that when Imboden conveyed it to them "it was agreed and understood at the time that the said lands were to be the property of W. J. Montgomery." He only paid \$675 for the lands, and the proof shows the value at \$20 per acre, or \$1,600.

M. R. Armstrong conveyed this land to A. J. Witt as trustee to secure the payment of a loan of \$500 from Sloan, along with other lands, and but \$250 has been paid on said indebtedness. Sloan, for whose benefit this deed of trust was made, claims to have been without knowledge of any of these matters, and an innocent purchaser or mortgagee. The complaint was dismissed for want of equity, and plaintiff appealed.

W. A. Cunningham and T. W. Campbell, for appellant.

1. The court of equity is a special guardian of the rights of minors, and will set aside judgments and decrees of any of the courts for fraud and where equity demands it. 54 Ark. 539; 50 Ark. 458; 68 Ark. 492; 73 Ark. 440; 73 Ark. 281; 75 Ark. 425. Montgomery occupied a trust position totally inconsistent with the position of purchaser, and would not, as a matter of public policy, be allowed to purchase. 20 Ark. 401; 23 Ark. 626; 26 Ark. 446; 30 Ark. 48; 33 Ark. 587; 42 Ark. 28; 41 Ark. 264. The removal of appellant's disabilities of minority was procured by fraud and by suppression of facts. Montgomery was under the obligation to make the fullest disclosure to the court of all the facts and circumstances connected with the transaction; but whether or not this proceeding stands or falls, the deed from the ward is presumptively fraudulent and void. 9 Am. St. Rep. 593; 117 Am. St. Rep. 250; 89 *Id.* 302.

2. Armstrong was not an innocent purchaser. One who has notice of facts sufficient to put a prudent man upon inquiry has notice of all he might have learned by such inquiry. 23 Ark. 744; 58 Ark. 453; *Id.* 91; 14 Ark. 69; 32 Ark. 251; 9 Am. St. Rep. 595. The fact that he paid Montgomery nearly \$1,000 less than the land was really worth is one of the strongest of the many evidences that he knew of appellant's rights in

the land. 58 Mo. 235; 25 Wis. 573; 97 N. C. 367; Eaton on Equity, 131.

McCaleb & Reeder and *Witt & Schoonover*, for appellees.

1. Both the decree of foreclosure and the decree removing appellant's disabilities of minority are valid as against collateral attack. 72 Ark. 601; *Id.* 299; *Id.* 101; 63 Ark. 1; 73 Ark. 27; 75 Ark. 175-80; 76 Ark. 465; 23 Ark. 121; 31 Ark. 74; 24 Ark. 122; 50 Ark. 338; 57 Ark. 49; 28 Ark. 171; 34 Ark. 642. While in a foreclosure proceeding a decree against a minor defendant without a defense by a guardian is voidable on appeal or other direct attack, yet it is not subject to collateral attack. 18 Ark. 53; 25 Ark. 52; 49 Ark. 397; 56 Ark. 137; 50 Ark. 190; 23 Cyc. 1062; *Id.* 1070; 1 Black on Judgments, § 252; *Id.* § 246; 92 Ark. 611; 23 Cyc. 1072; 71 Ark. 330; 72 Ark. 299.

2. If this be held to be a direct proceeding, then appellant has joined in her complaint two actions which can not properly be joined in one action, and a failure to sustain either is fatal to her case.

3. In order to set aside a judgment or decree for fraud, the proof of fraud must be satisfactory and convincing. 73 Ark. 286. If the proof had been sufficient to show that fraud had been committed, it is not sufficient to show that Armstrong had any connection with it, and he, being an innocent purchaser, is entitled to be protected as such. The findings of the chancellor are clearly sustained by the preponderance of the testimony, and ought to be sustained by this court. 89 Ark. 132; *Id.* 309; 90 Ark. 166; 91 Ark. 69; *Id.* 149; *Id.* 246; *Id.* 268; *Id.* 299.

KIRBY, J., (after stating the facts). Was Montgomery, the guardian, under such disability to purchase these lands as that they will be charged with a trust in his hands and those of his vendee with notice?

In *Hindman v. O'Connor*, 54 Ark. 633, this court said: "As a general rule, a party occupying a relation of trust or confidence to another is in equity bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him or which has a tendency to interfere with such duty. Upon this principle no one placed in a situation of trust or confidence in reference

to the subject of a sale can be the purchaser, on his own account, of the property sold."

Continuing, quoting from *Imboden v. Hunter*, 23 Ark. 622: "The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons in a situation of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

And further using the language in *Clements v. Cates*, 49 Ark. 242: "The law forbids a trustee and all other persons occupying a fiduciary or *quasi*-fiduciary position from taking personal advantage touching the things or subject as to which such fiduciary position exists. * * * If such a person acquires an interest in property as to which such relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition." Continuing, with reference to the rule (page 635): "Its applicability to guardians and wards and persons standing in like relation is apparent. Judge Story, in speaking on this rule, says: "In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that during the existence of the guardianship the transactions of the guardian can not be binding on the ward if they are of any disadvantage to him; and indeed the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate in the highest sense of the term the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually sub-

ing, especially if all the duties attached to the situation have not ceased; as if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian. 1 Story on Equity. (13 ed.) § 317."

The wisdom of the rule was never better exemplified than in this case. Here the guardian, Montgomery, contrary to his express promise to the dying father of this ward, who left in his hands means for the payment of the note secured by a mortgage on these lands, and in violation of his duty as guardian to protect her interests, let the mortgage be foreclosed and procured the lands to be bought in for a grossly inadequate consideration and held for his benefit. As one of the witnesses said who had rented the land in 1899 and 1900: "Montgomery claimed to own the land. He said there was a mortgage on the place when Arnold died, and that he let it rock along and sell and bought it in himself." He has held possession of the lands from the death of Arnold in 1896 to January, 1908, and collected from \$40 to \$70 a year rent, and he has never charged himself as guardian therewith nor accounted therefor.

"The doctrine as to purchases by trustees, guardians, administrators and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase it is not necessary to show that it is actually fraudulent or advantageous. If the trustee or other person having a confidential character can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty and the hazard of abuse and to remove the trustee and other persons having confidential relations from temptation that the rule does and will permit the *cestui que trust* or other person to come at his option and, without showing actual injury or fraud, have the sale set aside." *Hindman v. O'Connor*, 54 Ark. 640, and cases cited.

W. J. Montgomery comes within this rule, and appellant is entitled to an accounting for rents and profits; and if M.

R. Armstrong purchased with knowledge of the conditions and relation, he is in no better position than his vendor. Was he an innocent purchaser? He knew that Montgomery was guardian of plaintiff, that the relation was still in existence, and the accounts not closed; that she had lived at his home as a member of his family from early infancy, and was under his influence; that she inherited this land from her father; that it had been sold since Montgomery's appointment as guardian; that the title to same was held by another for him, and he had been in possession since his appointment as guardian; required the order of removal of the disability of the ward and a conveyance from her before purchasing, as Montgomery says, and examined the papers and record of it before paying any of the purchase price; knew that the order of court was procured through Montgomery's influence over his ward and the conveyance thereunder without consideration to the minor, and that she would have no benefit from the purchase money he was to pay. He can not be regarded an innocent purchaser. Clay Sloan, who loaned the \$500, to secure which a deed of trust conveying these lands to A. J. Witt as trustee was made, appears from the evidence to be entitled to protection as an innocent purchaser or mortgagee. Since the cancellation of the deeds would not effect the proper relief, the lands will be charged with a trust in the hands of M. R. Armstrong for the benefit of appellant, and the securities marshaled, and all the other lands in the said Clay Sloan mortgage sold, and the proceeds applied to its discharge, before these lands can be resorted to under said mortgage; and, if it shall not thereby be paid in full, then appellant shall have the right to redeem upon payment of the balance.

The case is reversed, with directions to render a decree in accordance with this opinion, and for such other proceedings as are necessary and in accordance with law.

HARDIN v. HANCOCK.

Opinion delivered November 28, 1910.

HOMESTEAD—SELECTION BY COURT.—In a suit to set aside a fraudulent conveyance by a deceased debtor to his wife of land situated in a town,

which included his unselected homestead, it was not error to set apart one acre of the land, containing his dwelling house and out-houses, as a homestead for his minor children, and subject the remainder to the claims of his creditors.

Appeal from Clay Chancery Court, Eastern District; *Edward D. Robertson*, Chancellor; affirmed.

J. D. Block and *R. H. Dudley*, for appellant.

If the conveyance of the land from R. L. Hancock to his wife was void for fraud, it avoided the whole conveyance. At the death of both R. L. Hancock and his wife without issue, the land lost the character of a homestead, and the court erred in setting off as a homestead the one acre tract at the suit of collateral heirs. 70 Ark. 69; 21 Cyc. 624; *Id.* 458; 47 Ark. 403; 55 Ark. 139; Wait on Fraud. Conv. 166; 3 Wyo. 639; 29 Pac. 270; 33 Ark. 454; Waples, Homestead & Ex., 683; 34 Ark. 112; art. 9, § 3-5, Const.; Kirby's Digest, § 3900; 31 Ark. 466; 18 Fla. 823; 29 Ark. 412; 48 Ark. 230; 81 U. S. 849.

Lafayette Hunter, for appellee.

There can be no conveyance of a homestead in fraud of creditors. It is exempt, whether specifically claimed as such or not. At D. J. Hancock's death the title to the homestead vested in her heirs. 45 Ark. 385; 75 Ark. 205; *Id.* 591, and cases cited; 79 Ark. 215; 56 Ark. 156.

KIRBY, J. This suit was brought by J. H. Hardin on January 11, 1906, who had recovered a judgment against R. L. Hancock in October, 1905, which was unpaid, to set aside a conveyance made by R. L. Hancock to his wife, D. J. Hancock, on August 2, 1902, as in fraud of creditors. Among the lands conveyed was a tract of two or three acres in the town of Piggott, upon which said Hancock had fixed his residence and home and long resided with his wife. D. J. Hancock having died, the suit was brought against her collateral heirs, who answered after R. L. Hancock's death, denying that the conveyance was in fraud of creditors, and alleged that it was for land upon which said R. L. Hancock had established his home, and was exempt from the payment of any debt he owed. A decree was rendered setting aside the conveyance, as in fraud of creditors, of the land claimed as a homestead, except one acre of the

same upon which is located the dwelling house, barn and out-houses, and setting off said homestead to said heirs, and the remainder of the tract was ordered sold for payment of plaintiff's judgment, and from this judgment plaintiff appealed. No question is raised as to finality of the judgment.

It is contended that the court erred in declaring one acre of said tract of land the homestead of R. L. Hancock and exempt from the claims of his creditors, and setting it off to the collateral heirs of D. J. Hancock, his grantee, after adjudging the conveyance void as in fraud of creditors, except as to one acre, when neither said R. L. Hancock nor D. J. Hancock had ever formally selected said one acre as a homestead during life.

It is conceded that R. L. Hancock and D. J. Hancock, his wife, occupied the residence on this three-acre tract of land in the town of Piggott as a homestead before any judgment was obtained against R. L. Hancock, and at the time of the conveyance to D. J. Hancock, and both of them died there without any necessity having arisen for the selection of a particular acre of land. Under our Constitution and decisions, as creditors have no lien upon a homestead by reason of their judgments, nor right to it for the satisfaction of their debts, they are not concerned in its transfer. A debtor can make a voluntary conveyance of it, convey it with bad motives in regard to them, or make any other disposition of it, and they have no standing to attack it as fraudulent. As to the homestead, there are no creditors.

"The homestead in any city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre of land with the improvements thereon, to be selected by the owner," etc. Art. 9, § 5, Constitution, 1874.

The Constitution limits the homestead in a town to one acre, if it does not exceed in value \$2,500, as in this case; and further, to that particular acre "occupied as a residence," "with the improvements thereon," and the law does not permit it to be laid off in an arbitrary, capricious and unreasonable shape, to the injury of creditors having an interest in the remainder of the tract, thus nearly fixing the segregation of it.

Since the plaintiff had no right to have that portion of his debtor's land that was impressed with the homestead and occu-

pied as such, to the extent of one acre, subjected to the payment of his debt, nor any interest in nor claim upon it, but only to the land in excess of the one acre allowed as a homestead, it can make no difference to him by whom the exact boundaries, are defined, so it be done in accordance with the law; and the court committed no error in having it set off to the heirs who inherited it from D. J. Hancock, grantee of R. L. Hancock.

Decree is affirmed.

FORD v. STATE.

Opinion delivered December 5, 1910.

1. HOMICIDE—SELF-DEFENSE—PROVOCATION.—An instruction in a prosecution for murder to the effect that the defendant was justified in killing if he had been informed of threats against his life made by decedent and had reason to believe that decedent was in the act of executing such threats was properly refused, as it failed to allege that defendant must have been without fault in inviting or provoking the assault. (Page 587.)
2. EVIDENCE—RES GESTAE.—Testimony of a witness in a homicide case that at the time of the shooting and in its vicinity he heard some one exclaim "Oh, don't!" was admissible as part of the *res gestae*, without proof that it was made by decedent. (Page 588.)
3. SAME—TESTIMONY OF NONEXPERT.—It was not error in a murder case to permit an unskilled witness to prove that a line drawn from where the bullets struck to where the decedent was shot, if extended, would pass over a certain pile of cross ties. (Page 588.)
4. APPEAL AND ERROR—HARMLESS ERROR.—It was not prejudicial error in a murder case to permit nonexpert witnesses to testify as to the range of bullets in decedent's body where an expert witness testified to the same effect, and there was no dispute as to such fact. (Page 588.)
5. HOMICIDE—EVIDENCE.—Testimony in a murder case that a person who resembled defendant was seen near decedent's house at night a week before the killing, and that he appeared to have a stick in his hand was not prejudicial where the court directed the jury to disregard it unless the evidence showed that it was the defendant. (Page 588.)
6. SAME—EVIDENCE.—It was not error, in a prosecution for murder, to admit testimony showing the disturbed condition of the ground near the scene of the killing, as though some person or animal had

stood or walked there, though the witness could not say when the tracks were made. (Page 589.)

7. **SAME—EVIDENCE—MOTIVE OF KILLING.**—It was not error, in a murder case, to prove that at the time of the killing an indictment was pending against defendant for an assault with intent to kill decedent, as such fact tended to show a motive for the killing. (Page 589.)
8. **APPEAL AND ERROR—HARMLESS ERROR.**—The admission of evidence which tended to establish guilt of a higher degree than that of which defendant was convicted was harmless. (Page 589.)

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; affirmed.

Searcy & Parks and *Powell & Taylor*, for appellant.

1. The third instruction requested by defendant was correct and should have been given. 51 S. W. 238; 81 S. W. 33.

2. The testimony of the witness Tuland that at the time of the shooting he heard some one exclaim "Oh, don't!" without identifying who it was, either by sight or sound of voice, was improperly admitted. 43 Ark. 289; 71 Ark. 112; 56 Ark. 326.

3. The location of the house, the pile of crossties and the body of deceased were capable of being described to the jury in the ordinary way. The testimony of witnesses with reference to the range of the bullets, the direction from which they came, etc., was therefore inadmissible. 82 Ark. 214; 85 Ark. 64; 63 Ark. 467.

4. The testimony of Dean Gaines should have been excluded. 71 Ark. 112; *Id.* 150.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

1. The third instruction requested by the defendant was properly refused because in the form asked it ignores that requirement of the law of self-defense that one who pleads justification for his act must be without blame for the necessity which requires such act. 73 Ark. 568; *Id.* 399; 69 Ark. 558; Wharton on Homicide (3 ed.) Bowlby, 511 and cases cited in notes 1 and 2; 35 Tex. Crim. App. 2; 23 *Id.* 164.

2. The exclamation, "Oh, don't!", testified to by the witness Tuland, was admissible as a part of the *res gestae*. Wigmore on Evidence, § § 1755, 1790; 65 Ark. 590; 85 Ark. 479; Wharton on Evidence, 258-267; 21 Ark. Law Rep. 423.

3. The testimony with reference to the range of the bullets, the direction from which they came, etc., was admissible.

KIRBY, J. The appellant, Burke Ford, was indicted for murder in the first degree for killing C. G. Wooley, and, after plea of not guilty, on trial convicted of murder in the second degree, and sentenced to twenty-one years in the penitentiary.

The evidence shows that C. G. Wooley was killed, being shot twice with a double-barreled shotgun loaded with buck-shot early on the night of December 31, 1909, while on his way home from the depot house near some piles of cross ties on the side of the street near its crossing of the railroad track in the town of Lewisville. A hotel proprietor by the name of Mat E. Mulkey was the first to reach the scene of the tragedy. The man who was shot, according to this witness, Mulkey, lived only about two minutes after he reached him, and never made any statement whatever as to the cause of the difficulty which ended so suddenly in his death. Another witness for the State testified that he heard some one crying out, "Oh, don't!" and that he saw the flash of a gun, and that the cry seemed to proceed from the immediate vicinity of the shots, although the witness did not identify the voice as being either the voice of the man who was killed or of the accused. The mortally wounded man, whose name was Wooley, was lying doubled up on the ground, with his coat buttoned up, and the witness, Mulkey, took from his hip pocket a revolver, which was almost securely concealed in the pocket, and could only just be seen by the witness. In a short time quite a crowd had gathered about the body. There were found upon the ground, close to this pile of cross ties, a number of gun wads some feet distant from the body. A straight line drawn from the gun wads across the body would hit near the corner of a house about 150 feet away, and it was found that bullets had struck near the corner of this house. The same straight line drawn from the point where the bullets were found across the deceased's body, and in line with the gun wads, would pass over the corner of the pile of cross ties.

A casual examination on the part of a physician, and one other witness, showed that the bullets ranged upward in the body of deceased. A short time after the shots were fired, Burke Ford, the appellant in this case, was seen in front of the court-

house, and there admitted voluntarily that he had killed Wooley, and, when asked what he killed him for, he said that that was his business, and that he did not care to say.

It was shown in evidence by several witnesses that the deceased and the accused had had trouble several months prior to the killing, and that as a result of that difficulty an indictment had been returned against the accused, charging him with an assault with the intent to kill the deceased; that this indictment was secured upon the testimony of the deceased, who was to be a witness at the trial, which was to have taken place at the December term of court in 1909. It was also shown that the accused had been in the habit for some time of carrying a double-barreled shotgun with him wherever he went, and one witness testified that on the night before Christmas he saw some one near Wooley's house that very much resembled the accused, but that he was not positive that it was he, and that he was carrying something that looked like a stick.

It was shown by witnesses that behind the pile of cross ties, heretofore mentioned, the ground had been considerably tracked up, and the theory of the prosecution was that the accused had stationed himself behind this pile of ties, and there had patiently awaited until the deceased passed along the road, which came from his house, and which the accused knew he (deceased) would travel that evening; that when he did come along later he fired on him at close range with two barrels loaded with buckshot.

The appellant testified that he shot the accused, and that he did so acting in self-defense; that numerous parties had told him that the accused had threatened his life; that he (deceased) went armed at all times, and that therefore he carried his gun with him that he might protect himself from any assault that the deceased might make upon him; that on the night of the killing he was coming down the street, when he saw the deceased approaching him; that he stepped out of the road in order that the deceased might pass without his being seen, and therefore that a difficulty might be avoided. He testified, however, that the deceased recognized him, and, uttering an oath, declared, "I have got you now!" And at the same time threw his right hand to his hip pocket, as if in the act of drawing a revolver

therefrom; that he, from the action of the deceased, was convinced that he was about to make a deadly assault upon him, and was even in the act of drawing a pistol for that purpose, and that he cocked one of the barrels of his gun, and, without putting the gun to his shoulder, fired; that he did not know when he cocked or fired the other barrel; that he went home, and afterwards surrendered to the sheriff, telling him that he had killed the deceased.

Appellant also testified that he had no desire to get the accused out of the way, so that he might not testify against him; that he had even left the county and State in order to avoid having difficulties with him.

Appellant introduced as a witness a colored man, who lived on his brother's place, who testified that at about 8 o'clock on the evening of the killing he met the accused down the street across the railroad, and that he spoke to him, and the accused told him he was going to his brother's house; that this was about 8 o'clock, and before the shooting.

This testimony does not correspond with the testimony of J. E. Hennegan, a witness for the State, who testified that, after the shooting, he and the circuit clerk and one other party saw the accused in front of the court house, at which time he admitted that he had killed the deceased, and that his reasons for doing so he did not desire to divulge; that at this time it was not yet 7:30; that he knew this because the train had not come.

The testimony of the negro about meeting the accused walking down the street towards his brother's house was for the purpose of showing that if that were the accused he could not have been stationed behind the pile of ties, lying in ambush for the approach of the man whom he afterwards killed.

The accused testified that he was not behind the pile of cross ties, but was some six or eight feet from the end thereof. The accused also denied that the deceased made any statement or outcry, except that mentioned above, before the fatal shots were fired, but stated that, after he fired the first time, the deceased did make some statement, but what it was he did not know.

C. C. DuBose, a witness for the State, testified: "I am the clerk of the circuit court, and was last December and January.

There was a case pending in court here in which Burke Ford was charged with an assault with intent to kill on one C. G. Wooley, in which Wooley was a witness here at that term of court. The case was set for trial a week after that time; don't know exact date. Wooley was killed in December, and the trial was set for the following Monday or Tuesday. Yes, sir; charged with assault with intent to kill. Defendant was under bond."

Other testimony will be noted along with the objections to it.

The court gave thirteen instructions at the request of the State, each being objected to by defendant; gave six on the part of defendant and refused to give instruction number three asked by defendant, which reads:

"3. The jury are instructed that if they find from the evidence that prior to the shooting the deceased had made threats against the life of the defendant, and that these threats had been communicated to the defendant before the shooting, then you are told that the defendant had a right to arm with a shotgun for the purpose of protecting his own life against such threatened assaults; and if you find that after a knowledge of these threats defendant met deceased, and at said time the words and conduct of deceased were of such hostile nature as to lead the defendant, acting as a reasonably prudent person, to believe that the deceased was then in the act of carrying such threats into execution, then you are told that he was not required to retreat, but had a right to shoot the deceased."

From the verdict of guilty and judgment defendant appealed.

It is contended that the court erred in permitting the introduction of certain testimony over defendant's objection, and in refusing defendant's requested instruction number three. Was error committed in refusing said instruction? We do not think so. The defendant would not have the right to arm himself to protect his life against threatened assault by another and seek him and provoke him to a difficulty, and then when the danger appeared to be imminent and impending stand his ground and slay his adversary to prevent great bodily harm or death to himself; and this idea of defendant being without fault in not having invited or provoked the assault should have been in-

cluded in the instruction. *Bishop v. State*, 73 Ark. 568; *Nash v. State*, 73 Ark. 399; *Blair v. State*, 69 Ark. 558.

Defendant's next contention that the court erred in permitting a witness for the State to testify that at the time of the shooting he heard some one, without knowing who it was, hollo, "Oh, don't!" is without merit. John Tuland stated that he saw the flash of the gun's fire over close to Ingram's house, heard the exclamation "Oh, don't!" emanating from the vicinity of the firing, and at about the same time he saw the flash. He did not know whose voice it was, could not say whether it was made by deceased, or some one else, but that it was in the immediate vicinity of the firing and simultaneous with it. There was no evidence from which it could have been inferred that the statement was made by some bystander or eyewitness, and, even if it had been, it was a spontaneous exclamation, clearly a part of the *res gestae*, and admissible as such. Wigmore, Evidence, § § 1755, 1790; *Appleton v. State*, 61 Ark. 590; *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479; Wharton on Evidence, 258, 267; 11 Ency. Evidence, 316.

Neither do we think there was error in permitting witnesses to state where a line drawn across the gun wads and on across the body of deceased would strike a certain house beyond the body, nor where such line drawn from near the corner of the house where the bullets struck across the body and on over the wads would strike a pile of cross ties at the other end. It seems to us this is but an accurate way of describing the conditions to the jury, and it would certainly not require any previous training or skill on the part of the witness to testify thereto.

It is further objected that nonexpert witnesses were permitted to testify to the range of the bullets in the body of deceased; but, if such was error, it was not prejudicial, since Dr. Bright, a duly qualified expert witness, testified that they ranged upwards, and there was no dispute about it anyway.

The testimony of Dean Gaines that he had seen some one near Wooley's house at night the week before the killing, that it looked like Burke Ford, but he didn't know who it was, and whoever it was appeared to have a stick in his hands, could not have been prejudicial, if it was error, since the court directed the jury at the time to disregard it entirely unless the evidence showed it was Ford.

We do not think the court erred in permitting the introduction of testimony showing the disturbed condition of the ground between the ties or behind the pile of ties, as though some one had stood or walked there, when witnesses could not say whether the tracks were made by persons or animals or on the night of or the morning after the shooting, as it was a circumstance that could be taken into consideration, however little weight it would be entitled to before the jury.

Now, as to the introduction of the evidence by the circuit clerk, DuBose, that an indictment had been found against defendant Ford for assaulting Wooley with intent to kill upon deceased's testimony as prosecuting witness: it is not proper to attempt to prove one guilty of one offense by evidence that he has been indicted for the commission of another offense; but we can not think it improper to prove such fact to show the state of feeling existing between the same parties, as in this case, and there could have been no prejudicial error in permitting it since many other witnesses testified to it, and defendant himself stated he had cut deceased with a razor, and had returned to stand trial therefor, and had this very night been to town to see his lawyers relative to the defense of the case. We also think it was permissible to show this indictment, found upon the testimony of the deceased as prosecuting witness, as conducing to prove a motive on the part of defendant for the killing.

All the testimony about the introduction of which defendant complains only tended to convict him of murder in the first degree; and since the jury have found him guilty of a much lower grade of offense, it is apparent that no harm has been done him by its introduction. On the whole case, we do not find any reversible error, and the judgment is affirmed.

KING v. SLATER.

Opinion delivered December 5, 1910.

1. DEEDS—RESERVATION OF LIFE ESTATE.—A deed reserving a life estate in the grantor, and providing that the deed shall be absolute at the grantor's death, is valid. *Lewis v. Tisdale*, 75 Ark. 321, followed. (Page 592.)

2. EVIDENCE—DECLARATIONS OF GRANTOR.—The acts and declarations of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. (Page 593.)

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; affirmed.

Gaughan & Sifford, for appellant.

1. The question of the delivery of the deed is one of intention of the grantor. 74 Ark. 119; 77 Ark. 92; 124 S. W. 779. The preponderance of the testimony shows that Mary N. Van Hook never intended to deliver the deed to appellee.

2. Evidence of statements made by Mrs. Van Hook to other parties was admissible, first, because plaintiff himself introduced evidence of such statements before appellants introduced any witnesses. 14 Ark. 513. Second, because several of these statements were made while they were living together in confidential relations. And, third, because this case falls within the exception to the general rule, and within the rule announced in 59 Ark. 613.

3. Appellee did not perform the consideration. He was under obligation to bear with patience and tolerance the whims and caprices of his aged grandmother, and certainly none of the things said and done by her was sufficient to prevent him from carrying out his contract. 47 N. W. 768; 95 N. W. 741.

Mahoney & Mahoney, for appellee.

1. Evidence to prove statements made by Mrs. Van Hook in derogation of appellee's rights was inadmissible. 1 Greenleaf, 139; *Id.* 213.

2. The evidence of Mrs. Van Hook's intention to deliver the deed is manifested by her acts and directions to appellee, and that it was delivered pursuant to such intention is clear. 74 Ark. 119; 77 Ark. 92.

3. The evidence is ample that appellee performed his contract fully until he was compelled by Mrs. Van Hook to leave the place.

HART, J. Both appellee and appellants herein claim title to the lands in controversy from the same source. Mary N. Van Hook owned the lands. Appellee was the grandson of Mary N. Van Hook, and in 1896, at the request of both his grandparents, came to live with them and take care of them. R. C. Van Hook,

the husband of Mary N. Van Hook, died in October, 1900. Prior to his death, he conveyed the lands to his wife. Appellee continued to live with her after his death, and in 1902 she executed to him the following deed in consideration that he should support her during her natural life: "Know all men by these presents: That Mary N. Van Hook, a widow, for and in consideration of the sum of one dollar cash paid, the receipt of which I acknowledge, and the further consideration that the said Henry N. Slater is to allow me to use and occupy the land herein conveyed during my lifetime, and in case I leave the land he is to pay me \$85 per year, and at death this deed shall be absolute, and at such time I do hereby grant, bargain, sell and convey unto the said Henry N. Slater and unto his heirs and assigns forever the following lands lying in the county of Union and State of Arkansas, to wit: east one-half of southeast quarter of section 14; southwest quarter of southeast quarter section 14; east one-half of southwest quarter of section 15; fractional northeast quarter of section 30, and south one-half of southwest quarter of section 13, all in township 18 south, range 15 west, containing in all 430 acres more or less. To have and to hold the same unto the said Henry N. Slater and unto his heirs and assigns forever with all appurtenances thereunto belonging. And I hereby covenant with the said Henry N. Slater that I will forever warrant and defend the title to said lands against all claims whatever. Witness our hands this 26th day of September, 1902."

The acknowledgment to the deed bears date of November 12, 1902. Mary N. Van Hook remained in possession of the land until her death, which occurred in February, 1909. Appellee continued to reside with his grandmother until August, 1905, when he left the place. It is contended that the deed was delivered to him at the time it was executed, and that he did not carry out his contract to live on the place and take care of his grandmother because she would not permit him to do so. It is the contentions of appellants that the deed to appellee was never delivered, and that he left his grandmother without cause and refused to longer support her.

After appellee left her, Mrs. Van Hook went to live with her daughter, Callie V. King, and lived with her until her death, which occurred as above stated in February, 1909.

On December 17, 1908, Mrs. Van Hook conveyed the lands in controversy by deed to appellants in consideration that they should take care of her during her natural life. Appellants did not then know of the deed made to appellee. After the death of Mrs. Van Hook appellee instituted this suit in the chancery court against appellants to cancel the deed made to them as a cloud upon his title. The chancellor found in favor of appellee, and entered a decree cancelling the deed to appellants as cloud upon appellee's title, and awarded him possession of the lands. To reverse that decree this appeal is prosecuted.

The deed dated September 12, 1902, was effective to convey the title to appellee if it was delivered. *Lewis v. Tisdale*, 75 Ark. 321. Was it delivered?

Appellee testified positively and unequivocally that it was delivered to him at the time it was executed. Alice Barksdale, a neighbor, testified that after Mr. Van Hook's death, Mrs. Mary N. Van Hook told her that she had deeded the lands in controversy to appellee. Tom Van Hook testified that his grandmother, Mary N. Van Hook, told him that she had conveyed the land to appellee, and that she had given him the deed. Eliza W. Nelson, the mother of appellee and sister of appellant Callie V. King, testified that her mother told her that she intended for appellee to have the land, and that when the deed was made she was present, and that her mother told Dr. Pinson, before whom the acknowledgment was taken, that she intended for appellee to have it.

To overcome this positive and direct testimony, appellants introduced evidence tending to prove that in 1904 Mrs. Van Hook executed a second deed to the same lands to appellee which contained different terms and conditions; and that appellee knew of the execution of this deed, and of the fact that it was not delivered to him, but was kept in the possession of Mrs. Van Hook. They also introduced W. J. Pinson, who was the officer before whom the acknowledgment of the first deed was taken. He at first stated after the first deed was acknowledged it was handed back to Mrs. Van Hook and by her taken out of his office. Pinson was recalled by appellants, and stated that a re-examination of the deed shows it to have been changed from what it was as originally executed; that the deed, as it now appears in the record, was acknowledged by Mrs. Van Hook

on November 12, and that after the new acknowledgment was taken he handed the deed back to her, and she took it out of the office.

On cross examination he said that he did not remember whether he handed the deed to appellee or Mrs. Van Hook, or whether appellee was present. Appellee had already testified that he was present, and that Pinson gave him the deed at the direction of his grandmother. It is also shown that, after the execution of the first deed, Mrs. Van Hook conveyed by deed a part of the lands with the knowledge and consent of appellee. Appellee states that at the same time other lands were purchased by her, and the deed made to him in lieu of that part which she sold.

Appellants also introduced evidence of several persons residing in the neighborhood who testified that Mrs. Van Hook had told them that she had never delivered the first deed to appellee, and that he was not taking care of her in the way he had agreed to do. The fact of the execution to appellee of a second deed different in terms and conditions from the first could not operate to divest his title if it had become invested by the delivery of the first deed; but it is of probative force to show that the first deed was not in fact delivered. While it is shown that appellee had knowledge that the second deed had been executed by his grandmother, and that it was being retained in her possession, it is not shown that he knew of the conditions imposed by it, and he testifies that he understood that it had been executed because the first deed had been lost, and within a few months after its execution he found the first deed, and gave no further consideration to the second deed.

The declarations of Mrs. Van Hook to her various neighbors that she had not delivered the deed to appellee is not competent.

It is the settled rule that the acts and declarations of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict the title. *Hughes Bros. v. Redus*, 90 Ark. 149; *Jeffery v. Jeffery*, 87 Ark. 496; *Scawell v. Young*, 77 Ark. 309; *McGuire v. Lovelace*, 128 S. W. (Ky.) 309; *Phillips v. Laughlin*, 2 Am. & Eng. Ann. Cas. 1. In the case of *Pentico v. Hays*, (Kan.) 9 L. R. A.

(N. S.) 224, the precise question raised here was decided adversely to the contention of appellants. The court held: "In such a case, on a trial to determine title to the land being had after the death of the mother, statements made by the mother after the recording of the deed may not be proved in derogation of the title of the child or its grantee." In that case as here the question at issue was whether the deed had been delivered. This court in the case of *Prater v. Frazier*, 11 Ark. 249, held: "The declarations of a donor against the title of the donee, made in his absence, are not admissible in evidence to defeat the title of the latter." The record does not affirmatively show that the chancellor ruled out this testimony; but the presumption is that his finding was based upon the testimony which was competent.

Upon the whole case, we conclude that the finding of the chancellor that the deed was delivered is not against the weight of the evidence, and it will be sustained.

The evidence shows that appellee was kind to his grandmother, and carried out his contract to live with her and support her until she caused him to leave.

The decree will be affirmed.

RICHESON v. NATIONAL BANK OF MENA.

Opinion delivered December 5, 1910.

1. SUBROGATION—SURETY PAYING PART OF SECURED DEBT.—A surety who has paid all of his principal's debt for which he was liable will not be entitled to be subrogated to a mortgage held by his principal's creditor so long as any indebtedness for which the mortgage is a security remains unpaid. (Page 600.)
2. CORPORATIONS—POWERS.—Under the general rule that a corporation can only do those things which are necessary to carry into effect the purposes for which it was organized, and can make no contract that is not expressly or by fair implication authorized by its charter, a corporation not expressly authorized to do so cannot ordinarily contract to become a surety for or lend its credit to another person or corporation. (Page 602.)
3. SAME—ULTRA VIRES CONTRACT—WHEN ENFORCED.—When an *ultra vires* contract entered into by a corporation has been fully performed by

the other party, and the corporation has had the benefit thereof, the contract is binding upon such corporation. (Page 602.)

4. MORTGAGES—DESCRIPTION OF DEBT.—A mortgage which describes the indebtedness intended to be secured as two certain notes and all other and further sums and amounts that may be advanced to the mortgagor by the mortgagee is sufficient to put a person examining the records upon inquiry. (Page 604.)
5. BANKS AND BANKING—NATIONAL BANK—EXCESSIVE LOAN.—The action of a national bank in making an excessive loan contrary to the national banking law can be objected to only by the United States, and cannot constitute a defense in favor of the debtor. (Page 605.)

Appeal from Polk Chancery Court; *W. H. Collins*, Special Chancellor; affirmed.

Willard P. Cave, for appellant.

1. Under the facts in this case, the only valid indebtedness secured by the mortgage was the two five thousand dollar notes upon which appellant was surety. This being true, appellant would be subrogated to the entire rights of the mortgagee, and entitled to priority of payment. 1 Jones on Mortgages (2 ed.) ¶ 881; Baylies on Sureties & Guarantors, 368, 369, § 5; 27 Cyc. 1070; *Id.* 1065.

2. The alleged assumption by the loan company of the lumber company's indebtedness was wholly executory, and so remains by reason of the fact that the loan company has paid out nothing under such assumption and guaranty. The contract was *ultra vires*, the loan company's charter not authorizing the corporation to become surety for others, and either party can plead its want of authority to make the contract. Kirby's Dig. § 839; Green's Brice's Ultra Vires, 252; 1 Clark & Marshall on Priv. Corp. ¶ 213; *Id.* 548, ¶ 208; 139 U. S. 24; 4 Clark & Marshall, Priv. Corp. ¶ 213; Child's Suretyship & Guaranty, 61, ¶ 52; 2 Beach, Priv. Corp. 706, ¶ 426; 2 Cook on Corp. § 774; 4 Thompson on Corp. ¶ 5739; 85 Ark. 185; 107 S. W. 676; 130 S. W. (Ark.) 162; 1 Clark & Marshall, Priv. Corp. ¶ 184; Baylies, Sure. & Guar., §§ 2 and 3, pp. 46-48; *Id.* § 7, p. 17; 3 Thompson, Corp. ¶ 3990; 4 *Id.* 5721; 10 Cyc., 1109, § 7; 70 Ia. 541; 7 Wis. 59; 38 N. Y. St. 602; 85 Tenn. 793; 91 Pa. St. 367; 50 Conn. 167.

Wright Prickett and *Elmer J. Lundy*, for appellee.

1. The appellant can not question the validity of the mortgage, or a part of it, on the ground that it is vague, indefinite or uncertain. The description of the indebtedness sought to be secured was sufficient to put interested parties on inquiry, and that was sufficient. 1 Jones on Mortgages (6 ed.), § 342, p. 279; *Id.* § 343, p. 280; *Id.* § 364 *et seq.*; 46 Ark. 70; 55 Ark. 569; 20 Am. & Eng. Enc. of L. (2 ed.) 925; 120 U. S. 765; 27 Cyc. 1059. Neither can he question it as a creditor without notice. He had actual notice of the mortgage when made; moreover, he is charged with notice of it from the time it was recorded. Kirby's Dig. § § 5395, 5396; 40 Ark. 430; 1 Jones on Mortgages (6 ed.) § 524; Bispham's Eq. (2 ed.) 338, § 270. He is estopped to deny its validity, because he knew it was made at the time he signed the notes, and offered no objection to its terms. 11 Am. & Eng. Enc. of L. (2 ed.) 436; 53 Ark. 196.

2. Appellant is in no position to question the validity of the loan company's assumption to the bank's debt. The loan company under some circumstances might plead *ultra vires*, but it has not; on the contrary, asserts its liability under the assignment. A stranger to the transaction, to whom the corporation owes no duty, can not set up this plea. 29 Am. & Eng. Enc. of L. (2 ed.) 80; 10 Cyc. 1166; 105 U. S. 166. The lumber company can not attack it as *ultra vires*. 98 U. S. 621; 70 Ark. 232; 81 Mo. 26; 157 Mass. 548. The assumption of the debt, under the circumstances of this case, was not in fact *ultra vires*. 7 Am. & Eng. Enc. of L. (2 ed.) 701; *Id.* 755. The president of the lumber company had authority to execute the mortgage; but if he did not, neither appellant nor the company can now question his act as *ultra vires*. 10 Cyc. 1148-9; 29 Am. & Eng. Enc. of L. (2 ed.) 86; *Id.* 88.

3. The lumber company having received and expended the \$5,000 for which the note of S. G. Richeson was given, it could not escape liability by claiming that the note was not signed until the mortgage was given. 70 Ark. 232; 98 U. S. 621.

4. Appellant will not be heard to claim that the loan was a violation of the national banking laws. The loan, though in excess of the amount prescribed by statute, can be recovered in full from a borrower. 96 U. S. 640; Magee on Bank and Banking, 325, § 228.

5. A surety's right of subrogation is limited to the rights arising under the debt he pays. Sheldon on Subrogation, (2 ed.) 166; 27 Am. & Eng. Enc. of L. (2 ed.) 210. A surety for part of a debt can not be subrogated while the other part remains unpaid. Sheldon on Subrogation, 172; *Id.* 190-191; 27 Am. & Eng. Enc. of L. (2 ed.) 211; 2 Bouvier's Law Dict., Rawle's Revision, 1056; 53 Ark. 303. The right will not be enforced to defeat or interfere with equal equities of others. 1 Jones on Mortg. § 874; *Id.* § 885-b; 27 Am. & Eng. Enc. of L. (2 ed.) 204; Bispham's Equity, (2 ed.) § 338; 53 Ark. 303; 34 Ark. 113; 40 Ark. 132; 76 Ark. 245. Conventional subrogation has no application in this case. It arises only upon an agreement which must be express and specific. 1 Jones on Mortg., § 874b; Sheldon on Subrog., § 248, p. 372.

FRAUENTHAL, J. This is an appeal from a decree of the Polk Chancery Court determining the priority of liens of certain creditors upon the property of the Howard Lumber Company, a domestic manufacturing and business corporation, of whose assets said chancery court had taken charge under insolvency proceedings instituted against it. In February, 1909, the Howard Lumber Company was largely indebted to various creditors, and, though it had assets ordinarily worth more than its liabilities, it was pressed for money and unable to pay its debts. It was indebted to the National Bank of Mena (hereinafter referred to as the bank) in a sum, as claimed by that bank, amounting to \$11,650, and to other creditors in various sums aggregating about \$10,000. It was thought by the president and manager of the Howard Lumber Company (which will hereafter be referred to as the lumber company) that if sufficient money could be borrowed by it to pay the indebtedness of that company to all creditors other than the bank, and if said bank would extend the time of the payment of the debt due to it, the said lumber company could proceed with its business and succeed in paying all its liabilities. The cashier of the bank was also the president of the Hancock Land, Loan & Investment Company, a domestic corporation (which will be hereafter referred to as the loan company), and at a conference had by the officers of said bank and said loan company and the president of said lumber company an arrangement was effected by which the said lumber company could

borrow the required \$10,000 from said loan company. There is a slight conflict in the testimony as to the terms of the agreement that was then made by these parties. We think, however, that the testimony tends to establish the following facts: S. G. Richeson was the president of the lumber company, with its place of business located in Polk County, and S. A. Richeson, the appellant, was his brother, and resided at Rothville, Mo. Practically all the shares of stock of the said lumber company were owned by the brother and other relatives of appellant. At the above conference it was agreed that the said loan company would lend to the lumber company the required \$10,000 at a rate of interest of 10 per cent. per annum, and that the bank would extend the time of payment of the indebtedness due to it by the lumber company upon the loan company assuming and guarantying to pay said indebtedness. In consideration of the loan of said money and the assumption and guaranty of its said indebtedness to the bank, the lumber company agreed to execute to the loan company two notes for \$5,000 each, with said appellant as surety thereon, due six months after date and bearing interest at the rate of 10 per cent. per annum, and to execute to the loan company a mortgage upon all its properties in order to secure the payment of said \$10,000, and also the liability which it incurred by reason of its assumption and guaranty of the payment of said indebtedness due by the lumber company to the bank. In pursuance of the agreement, the board of directors of the lumber company adopted a resolution empowering and authorizing its president to negotiate a loan of \$22,000 in order to pay the obligations it then owed, and to execute a mortgage upon all the property of said lumber company in order to secure said loan. The total amount of the indebtedness of the lumber company at that time consisted of the alleged debt of \$11,650 to the bank and of about \$10,000 to its other creditors, aggregating about the said sum of \$22,000; and we think that the above resolution was adopted for the purpose of providing for the payment and security of the said above indebtedness. Thereupon the lumber company executed its two notes for \$5,000 each to the said loan company bearing the above rate of interest and due six months after date, and sent same to appellant at Rothville, Mo., for his execution

thereof as surety, which was done, and same were returned on February 23, 1909. On that day the loan company executed to the bank its written obligation by which in consideration of the loan made by it to said lumber company and the agreement on the part of the bank to extend the time of the payment of its indebtedness against the lumber company it did "assume and guaranty the payment of said debt of \$11,650, with interest," of the lumber company to the said bank; and in said written guaranty it is also stated that "the same shall be held and treated by all parties concerned as covered and secured by the terms and conditions of said mortgage." And on the same day and as a part of the same transaction the lumber company executed to the said loan company a mortgage on certain property therein described (which was substantially all its property) and said mortgage was duly filed for record on March 1, 1909. The indebtedness clause in said mortgage is as follows:

"This sale is on condition: That whereas the said Howard County Lumber Company is justly indebted to the said Hancock Land, Loan & Investment Company in the sum of ten thousand dollars (\$10,000) evidenced by its two several promissory notes of date February 20, 1909, for five thousand (\$5,000) dollars each, due and payable six (6) months after date with interest at the rate of 10 per cent. per annum from date until paid and for all other and further sums and amounts that may be advanced to the said Howard County Lumber Company by the Hancock Land, Loan & Investment Company from time to time, as well as all amounts assumed by the said Hancock Land, Loan & Investment Company for or on behalf of the said Howard County Lumber Company. Now, if the said Howard County Lumber Company shall pay said notes and all such other sums and amounts that may be assumed or advanced to it as provided in this instrument at the time and in the manner herein provided, then this conveyance shall be void, otherwise to remain in full force and effect."

The said loan company then loaned to the lumber company said \$10,000, which was used by the lumber company in the operation of its business, and the bank extended the time of the payment of the indebtedness due to it by the lumber company

in conformity with said agreement. At the maturity of said two notes of \$5,000 each in August, 1909, the surety, the appellant, paid same, and at his request the notes were sent to him. Later, on August 25, 1909, insolvency proceedings were instituted in said chancery court against said lumber company by its president under section 949 *et seq.* of Kirby's Digest. In said proceedings appellant filed an intervention, in which he claimed to be subrogated to the rights and indebtedness of the payee of said two notes which he had paid as surety of the lumber company and to the lien of the mortgage executed to secure the same, and therein claimed that he was entitled to a prior lien on the property conveyed by said mortgage. The loan company and the bank also filed interventions in said proceedings, and therein claimed that they were entitled by virtue of said mortgage to a first and prior lien on said property for the payment of the indebtedness of \$11,650 due by the said lumber company to said bank and the payment of which said loan company had assumed and guaranteed. The chancery court made a finding in favor of said interveners, the loan company and the bank, and rendered a decree declaring them entitled to a prior lien on all the property described in said mortgage. From this decree the intervener S. A. Richeson has appealed to this court.

The rights of the interveners to have lien impressed upon the property of the lumber company depend upon the terms of the mortgage executed by the lumber company to the loan company; and the priority of such liens between themselves depends upon the legality of the indebtedness claimed by each intervener and the equities existing between them. The lumber company became liable to the appellant by reason of his having executed the two notes of \$5,000 each as surety for it; and when as surety he paid the two notes the lumber company became indebted to him in the amount thereof. By the payment of the debt by him as surety he became substituted in the place of the creditors whose debt he paid, and, ordinarily, he would succeed to all rights which the creditor had in relation to that debt. Ordinarily, when the surety pays the debt of his principal, he is entitled to the benefit of all securities for the debt held by the creditor. But the surety is only entitled to the benefit of such securities and rights which are applicable to the con-

tract on which he is bound. His rights are founded upon the equitable doctrine of subrogation, and where other parties have equal or superior equities or rights growing out of such contract the rights of the surety will not be enforced so as to interfere with such rights or equities of such other parties. The contract out of which grows the right of appellant to be subrogated to the lien of the creditor on the property is founded on the mortgage executed to the creditor, the loan company. Upon the face of the mortgage it secures to the loan company the payment of two debts: the one being the notes upon which appellant was surety, and the other being the assumption and guaranty of the indebtedness of the lumber company to the bank. If this latter liability is legal and binding on the loan company, then the appellant by paying only a part of the debt secured by the mortgage can not defeat the right of the loan company to have the property first applied to the payment of the balance of the debt secured by the mortgage. Before the surety can claim the right to the benefit of any of the securities, he must first pay the entire debt of the principal for the payment of which the securities were given. As is said in the case of *Bank of Fayetteville v. Lorwein*, 76 Ark. 245: "The right of subrogation can not be enforced until the whole debt is paid, and until the creditor be wholly satisfied, there ought to and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim." Sheldon on Subrogation, § 127; 4 Pom. Eq. Jur. § 1419; 27 Am. & Eng. Ency. Law 210; *McConnell v. Beattie*, 34 Ark. 113, and cases cited in *Bank of Fayetteville v. Lorwein*, *supra*.

Under the testimony adduced in the case we do not think that the appellant acquired any rights to the security superior to the loan company at the time he paid the two notes, by reason of any agreement then made between him and the loan company, or by any act or conduct on its part. At that time the notes were owned by a bank at Fort Smith, Ark., which had purchased same from the loan company, and which sent same to the bank at Mena, Ark., for collection. At the time of paying these notes the appellant required that they be transferred to him and not marked paid. The notes, without indorsement of

any kind, were turned over to the president of the lumber company, who forwarded them to appellant. The loan company was not the holder of the notes at the time of the payment thereof, and neither did it nor the bank by any word or act waive any right which they had by virtue of said mortgage to the prior payment of the balance of the indebtedness secured thereby.

But it is urged by appellant that the assumption and guaranty by the loan company of the indebtedness due by the lumber company to the bank was not authorized by the charter of said loan company, and that such contract of guaranty and assumption was as to said loan company *ultra vires*; and that the loan company was therefore not legally bound for said indebtedness. The loan company was a domestic corporation organized for the following purposes: "To do a general brokerage business, to loan money, negotiate bonds and securities and other property." Ordinarily, a corporation can only do those things which are necessary to carry into effect the purposes for which it was organized, and it can do no act and can make no contract that is not expressly or by fair implication authorized by its charter. Ordinarily, a corporation not expressly authorized to do so can not legally contract to become a surety for or otherwise to lend its credit to another person or corporation. *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368. But a corporation will not be permitted to plead that it had exceeded its charter powers in making a contract where it has received the fruits and benefits of such contract. If the corporation has received the profits resulting from the compliance of the other party with the contract, it would be wholly unjust to allow the corporation to escape performance of the contract by which it realized these profits. As is said in the case of *Wright v. Hughes*, 119 Ind. 324: "The rule is now too thoroughly established to be longer open to question that where a contract has been executed and fully performed on the part of the corporation or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation." In the case of *Minneapolis F. & M. Mut. Ins. Co. v. Norman*, 74 Ark. 190, the court quoted with approval the following statement of the law in this regard: "It is well settled that a corporation can not avail itself of the defense of *ultra vires* when the contract

in question has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. * * * And, in general, the plea of *ultra vires* will not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong." *Arkadelphia Lumber Co. v. Posey*, 74 Ark. 377; *Bloom v. Home Ins. Agency*, 91 Ark. 367; *Dunbar v. Cazort & McGehee Co.*, 96 Ark. 308; 1 *Clark & Marshall on Private Cor.*, 579; 10 Cyc. 1158; *Flint & W. Mfg. Co. v. Kerr Murray Mfg. Co.*, 56 N. E. 858.

In the case at bar the loan of the money by the loan company to the lumber company, the assumption by it of the indebtedness of the lumber company to the bank, and the extension by the bank of the time of payment of its debt, constituted one transaction; and the mutual benefits and obligations growing therefrom to the parties became indivisible. The loan company was engaged in loaning its money, and for its compensation it received the interest which accrued thereon. This benefit it actually received by the execution of this contract. The bank, by virtue of the assumption by it of the bank's debt against the lumber company, extended the time of the payment thereof. It could have taken steps to enforce its collection, but it stayed its hand by reason of the execution of this contract, and thereby it was caused to act to its disadvantage. It actually performed the contract on its part by thus granting the extension of the time of payment of the debt due to it. On the one part, therefore, benefits have been received, and on the other part the contract has been actually executed.

If the loan company had not assumed and guarantied the payment of this debt, the bank could have taken steps, by legal process or otherwise, to have secured the payment of its debt against the lumber company. It would accomplish a legal wrong against the bank to now permit the loan company to claim that it exceeded its powers when by its contract it caused the bank to refrain from action to obtain security for its debt. Having received the fruits and benefit of the contract and having caused the bank to act to its disadvantage, the loan company should not now be permitted to violate the obligation of this contract, which it made. So that the loan company would

not be permitted to avail itself of the plea of *ultra vires* against the enforcement of this contract, if it was making such a defense. It follows therefore that the agreement entered into by the loan company to assume and guaranty the payment of the debt of the lumber company resulted in a binding obligation against it.

It is also urged that the indebtedness clause of the mortgage is too indefinite to include, or to give notice that it included, this indebtedness which was guarantied by the loan company. But we think that the character of the indebtedness is sufficiently set forth in the mortgage, and that it includes this assumed debt. The written contract by which this debt was assumed was executed at the time the mortgage was given, just as the two notes were; and it is manifest, as the testimony conclusively shows, that the mortgage was intended to secure the loan company upon the liability which it incurred by the assumption and guaranty of this debt. As is said in the case of *Curtis v. Flinn*, 46 Ark. 70: "If the mortgage contains a general description sufficient to embrace the liability intended to be secured, and to put a person on examining the records upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." *Hoye v. Burford*, 68 Ark. 256; *Cazort & McGehee Co. v. Dunbar*, 91 Ark. 400.

It is earnestly insisted by counsel for appellant that at the time of the execution of the said mortgage to the loan company the lumber company was only indebted to the bank in the sum of \$6,650, and that therefore this was the total amount of debt assumed by the loan company and covered by the mortgage. It appears from the testimony that at the time of the execution of the mortgage there was an indebtedness due to the bank of \$11,650. This was evidenced by two notes: one for \$6,650 executed by the lumber company and the other for \$5,000 executed by S. G. Richeson. Some time prior to February, 1909, S. G. Richeson, who was president and manager of the lumber company, executed his note to the bank for \$5,000, and the money thereby obtained from and loaned by the bank was at once placed to the credit of the lumber company, and was wholly for the benefit of and used by the lumber company. The lower court found that this loan was really made to and was for the sole benefit of the lumber company, and not in truth for the

benefit of S. G. Richeson personally. It appears that on account of the capitalization of the National Bank of Mena it was not permitted under national banking laws to loan to one individual or corporation an amount in excess of the \$6,650. At the time this \$5,000 loan was secured the lumber company was indebted to the bank in the sum of \$6,650, and on this account, while as a matter of fact the additional \$5,000 was a loan made to the lumber company, the note therefor was executed by said S. G. Richeson to the bank and from time to time was renewed by him. The court found that this note of \$5,000 was in fact the debt of the lumber company, and we think that its finding in this regard is sustained by sufficient evidence. It has been held by the Supreme Court of the United States that the action of a national bank in making an excessive loan contrary to the national banking law could only be objected to by the Government, and that the debtor could not urge the prohibitive provisions of the national statute against a recovery of such excessive loan. *Nat. Bank v. Matthews*, 98 U. S. 621; *Nat. Bank v. Whitney*, 103 U. S. 99; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 640.

It follows that the debtor, the loan company, can not avoid the payment of the money actually received by it from the National Bank of Mena, although it was in excess of the amount it was allowed to loan by reason of said statute. At the time of the execution of the mortgage, in February, 1909, the lumber company, recognizing that its indebtedness to the bank actually amounted to \$11,650, executed the note for \$5,000 which was given in renewal of the former Richeson note for that amount as well as the note for \$6,650. Thereupon the loan company by its said written agreement expressly assumed said indebtedness of \$11,650, and the mortgage was at the same time executed to secure the payment of that written assumption of the debt of the lumber company, which was stated in said written assumption or guaranty to be \$11,650.

We are therefore of the opinion that there is sufficient evidence to sustain the finding of the chancellor that the lumber company did at the time of the execution of the mortgage actually owe to the bank the sum of \$11,650, and that the loan company assumed the payment of that amount of indebtedness to the bank, and that it was the intention of the parties to secure

by the execution of said mortgage that amount of liability thus incurred by the loan company.

It follows that the lower court did not err in declaring in favor of appellees a prior lien upon the property described in said mortgage for the payment of the sum of \$11,500 which the lumber company owed to the bank and the payment of which was assumed and guarantied by the loan company.

The decree is accordingly affirmed.

TOLEDO COMPUTING SCALE COMPANY v. STEPHENS.

Opinion delivered December 5, 1910.

1. APPEAL AND ERROR.—The findings of fact of the court trying a case at law without a jury are as conclusive on appeal as a verdict of a jury and will not be disturbed if there is any evidence to support them. (Page 608.)
2. SALE—WITHDRAWAL OF ORDER.—Until accepted, a proposition to purchase a chattel may be withdrawn by the buyer, even though the order contains a provision that it shall not be countermanded, as there is no consideration for such an agreement. (Page 608.)

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; affirmed.

STATEMENT BY THE COURT.

On the 9th day of December, appellees gave to the agent of appellant a written order for a pair of scales to be shipped to them at their place of business at Sulphur Springs in the State of Arkansas. The order was addressed to appellant at its place of business at Toledo, Ohio, and contained a provision that the order should not be countermanded. The price to be paid was \$275, as follows: "\$25 cash with order; \$20 on delivery; balance \$30 per month evidenced by notes." Twenty-five dollars was paid when the order was given, and notes for \$30 each for the balance was executed. This suit was brought in a justice of the peace court to recover on the notes.

The defense that the order was countermanded before it was accepted was interposed. The case was appealed to the circuit court, and was there, by agreement, tried before the court

sitting as a jury. After introducing in evidence the written order for the scales, the appellant adduced evidence tending to show that the order was received on the 15th day of December, 1908, and that it was at once accepted and notice of acceptance at once was mailed to appellees. That "when the order was received and accepted, the usual course was followed in putting the order through the factory and in making the delivery f. o. b. Toledo, as stipulated in the order." After the scales were constructed, they were delivered on board the cars, and consigned to appellees at Sulphur Springs, Ark., on January 19, 1909. Appellees declined to receive them, and they were destroyed by fire after their arrival at Sulphur Springs while in the hands of the carrier. Appellees testified that, on the next night after they had given the order, they sold out their business, and telegraphed to appellant at its place of business in Toledo that they countermanded the order; that on the same night they sent a letter to appellant at Toledo, Ohio, countermanding the order, and that a letter would travel from Sulphur Springs to Toledo, Ohio. in two days; that a few days after the countermand they telephoned the agent of appellant, to whom they had given the order for the scales, at Rogers, Ark., that they countermanded the order.

The head of the order department of appellant testified that they never received a letter from appellees countermanding the order; but says they did receive a telegram from them, on the morning of the 16th of December, 1908, which had been sent as a night message on the 15th inst., cancelling their order for the scales.

The court found for appellees, and from the judgment rendered an appeal has been prosecuted to this court.

Rice & Dickson, for appellant.

The stipulation in the contract that the order should not be countermanded is binding upon the appellee. 75 Ark. 210. The agreement entered into cannot be rescinded by one of the parties. 83 Ark. 426. If it had been an order of the usual open kind, it still could not be countermanded after its receipt and acceptance. 74 Ark. 18.

McGill & Lindsey, for appellees.

1. In the absence of an agreement to the contrary, the order could be countermanded at any time before acceptance. 74 Ark. 16. And, even though there is an agreement not to countermand, the order could be countermanded, unless there was some consideration for the agreement. 24 Am. & Eng. Enc. of L. 1030; 1 Benjamin on Sales (4 Am. ed.), § 41.

2. There could at most, in this case, be nothing more than a breach of an executory contract to purchase made before the scales were shipped, and before their manufacture could have begun, and appellant's remedy would be a suit for a breach of the contract. 2 Benjamin, Sales, § § 1117 and 1118 and notes; 92 Ark. 111; 55 Ark. 401; 70 Ark. 39; 24 Am. & Eng. Enc. of L. 1116 and note 6, and 1117 and note 1; 7 Hill (N. Y.) 61.

HART J., (after stating the facts.) The rule is well settled by an unbroken line of decisions that the findings of a circuit court upon a disputed issue of fact submitted to it is as conclusive upon appeal as the verdict of a jury. That is to say, it will not be disturbed if there is any evidence to support it. The writing in question shows on its face that it was merely a proposal to purchase, and that it was not a contract of purchase or sale. It is so treated by the head of appellant's order department. Throughout his testimony he speaks of it as the order, and specifically names the date of its acceptance. As such it was subject to be countermanded or withdrawn at any time before acceptance. *Merchants' Exchange Co. v. Sanders*, 74 Ark. 16; *Main v. Tracey*, 86 Ark. 27.

This is true in this case, even though the order contained a provision that it should not be countermanded, for there was no consideration for such agreement. 24 Am. & Eng. Enc. of Law, p. 1030; 1 Benj. on Sales (4 Am. ed.), § 41.

Appellees adduced evidence tending to show that they countermanded the order by telegraph on the night following the day they gave the order, and at the same time sent to appellant, properly addressed, a letter countermanding the order; that such letter in the ordinary course of mail should have reached appellant two days after it was sent. They also testified that in a few days after the countermand they telephoned to the agent who received the order, telling him that they countermanded it. The order was dated December 9, and it is not claimed that this is not its true date.

The head of appellant's order department denies that he received the letter countermanding the order, and states that he did not receive the telegram until the 16th inst., after the order was accepted. He does not state, however, that he was the only one of appellant's employees who received communications addressed to it. In view of these facts and his interest in the result, and the further fact that no effort is made to overcome the inference that the sales agent might have received the countermand by telephone before the 15th inst., it can not be said that the finding of the court was arbitrary and without any substantial evidence to support it.

The judgment will therefore be affirmed.

BROWN v. NORVELL.

Opinion delivered December 5, 1910.

1. ADVERSE POSSESSION—EXTENT.—Where the evidence shows that the owner of a certain quarter section by parol gave it to the appellee, who took possession of a part thereof by virtue of such gift, her possession, being referable to the gift, extended to the boundaries of the land. (Page 612.)
2. LEVEES—DELINQUENT TAXES—VALIDITY OF SALE.—A sale of land for taxes due the St. Francis Levee District under Acts 1895, c. 71, was void where neither the owner residing in the county nor her tenant in possession was made a party to the suit to collect such taxes. *Van Etten v. Dougherty*, 83 Ark. 534, followed. (Page 613.)
3. GIFTS—ATTEMPT OF DONOR'S ADMINISTRATRIX TO SELL.—A donee of land was not required to take notice of a proceeding in the probate court to sell her land as part of her donor's estate. (Page 613.)
4. ESTOPPEL—SILENCE.—The owner of land, in possession under a parol gift, who knows that the property is being advertised for sale as the property of her donor's estate is under no obligation to seek out a prospective purchaser and notify him of her title. (Page 613.)

Appeal from Crittenden Circuit Court; *W. J. Lamb*, Special Judge; affirmed.

Wm. M. Randolph, George Randolph and Wassell Randolph, for appellees.

1. It was held on former appeal, reported in 74 Ark. p. 488, that plaintiff's title rested on a parol gift, perfected by possession

and improvements for more than seven years, and that if those allegations were true plaintiff had legal title. The circuit court, sitting as a jury, found such allegations to be true, and its findings are as conclusive as the verdict of a jury. 38 Ark. 438; 68 Ark. 83; 90 Ark. 500; 92 Ark. 45; 25 Ark. 562; 33 Ark. 100. The verdict of a jury will not be disturbed except where there is no evidence to support it. 15 Ark. 403; 13 Ark. 306; 19 Ark. 684; 23 Ark. 51; *Id.* 112; *Id.* 32; *Id.* 208; 51 Ark. 467; 57 Ark. 483; 84 Ark. 406; *Id.* 74.

2. Where there is a writing fixing the boundaries of a tract of land, and the party claiming thereunder has taken possession and inclosed a part of the tract, and the remainder is uninclosed and not adversely occupied, possession of the part extends to the whole. 1 Ark. 448; 34 Ark. 547; 71 Ark. 390; 75 Ark. 514; 78 Ark. 99; 21 Ark. 9; 33 Ark. 151; 80 Ark. 435. And the same is true in case of a parol gift of a designated tract of land having fixed boundaries, and the donee enters upon a part of the land and actually occupies it. Buswell on Limitations & Adverse Possession, § § 259, 264, 267; Angell on Limitations, § § 404-405; Sedgwick & Wait, on Trial of Title to Land, § § 762, 773, 780; Wood on Limitations of Actions, § 259; 52 Mo. 108; 3 Watts (Pa.) 72.

3. Appellees are not estopped. Mrs. Norvell was in possession of the land by her tenant Rhodes when the sales for levee taxes were made, yet neither was made a party to the suit for levee taxes. As to the sale by the administrator, that could not affect her title. She was not a party to the administration, and not required to take notice of anything done in the course of such administration. 77 Ark. 477; 83 Ark. 534; 86 Ark. 394; 76 Ark. 25, 27.

R. G. Brown and Allen Hughes, for appellants.

1. It is apparent from the testimony that there was no present gift, but that the conversation between Earle and Mrs. Norvell contemplated a gift in the future. To make a valid gift the evidence must show that the property was intended presently to pass. 43 Ark. 319, 320; 1 Ark. 83; 44 Ark. 45; 129 Fed. 287; 14 Am. & Eng. Enc. of L. (2 ed.) 1017. The improvements having been placed on the land by Dr. Norvell during his lifetime and under his contract of purchase on which he

paid nothing, this raises no equity in favor of appellees. 63 Ark. 105; 82 Ark. 40.

2. If there was a gift *in praesenti*, it is manifest from the language employed by the donor that he referred only to the cultivated land which Mrs. Norvell had had in her possession, and the gift could not apply on any other.

3. Appellees are estopped from setting up title by the action of Mrs. Norvell, who, having knowledge that land was advertised for sale by the administrator, and by the commissioner under the levee tax decree, allowed it to be sold without giving any notice of her claim of title or asserting any claim of right therein.

4. The decree for the levee tax sale was regular and valid, and the burden is upon the appellees on collateral attack to show the facts which avoid the decree. 84 Ark. 527; 79 Ark. 16.

HART, J. The first appeal in this case is reported in 74 Ark. 484 under the style of *Brown v. Norvell*, and reference is made to that decision for a statement of the case. In accordance with the mandate the case was transferred to the circuit court, where it proceeded as an action of ejectment. The case was by agreement tried before the court sitting as a jury upon the record made on the first appeal.

The court found that the appellees had title to the land. Judgment was accordingly rendered in their favor for the possession of the land, and a reference was made to a special master to take proof and state an account of the amount of rents and profits received by appellants and the value of the improvements made by them and the amount of taxes paid by them. Appellants took an appeal from that judgment without waiting for the report of the master. This court held that the judgment was interlocutory and not appealable until the questions submitted to the master were disposed of. See *Brown v. Norvell*, 88 Ark. 590. Afterwards, the master made his report showing a balance in favor of appellees of \$1,749.14. From the judgment rendered, appellants have again prosecuted an appeal to this court, and appellees have taken a cross-appeal.

As will be seen from the statement of the case in 74 Ark. 484, appellees claim title to the land by virtue of a parol gift to their mother, Laura M. Norvell, by Josiah F. Earle, and the cir-

cuit court so found. It is the contention of appellants that the evidence does not sustain the finding of the court. Laura M. Norvell testifies positively and unequivocally that Josiah F. Earle, who was her brother-in-law, made her a gift in fee of the lands in controversy, towit, the northwest quarter of section 32, township 8 north, range 6 east. She states that her husband in his lifetime, by parol, purchased the lands and went into possession of the same; that he began to clear and cultivate them, but did not make any payments on the purchase price; that he died in 1872, and that after his death, Josiah F. Earle made her a gift of the lands; and that she continued in possession of the same, cultivating and improving them and collecting the rents therefrom. On cross examination, in answer to the question, "Did he (referring to Josiah F. Earle) say I will make you a present of it (referring to the land in controversy)?" she said: "He said, I will make you a present of it right now. It is yours from this on."

Ben Earle testified that he was a son of Josiah F. Earle, and that his father died in 1884. He said that he had frequently heard his father in his lifetime say that he had given Mrs. Norvell the land in controversy. Several other witnesses testified that Josiah F. Earle had stated to them that he had given the land to Mrs. Norvell, and that he intended to execute a deed to her; that he had great affection for Mrs. Norvell, who was his wife's sister, and always spoke of the land as her land. There is nothing to contradict this testimony except such inference as may be drawn from the fact that Earle paid the taxes on the land after the date of his alleged gift; but this is explained by the fact that he was in good circumstances, and that she was poor, and that he did it from a desire to help her. On one occasion, when looking after his taxes, when he came to the description of the land in controversy, he said that it belonged to Mrs. Norvell. The testimony shows that Josiah F. Earle assisted Mrs. Norvell in many ways; that he always treated and spoke of the land as belonging to her by gift from himself, and that he never claimed or demanded from her any rent for it.

The testimony tending to establish the parol gift of the land to Mrs. Norvell is clear and direct, and we think is amply sufficient to support the finding of the circuit court. See *Young v. Crawford*, 82 Ark. 33.

It is also contended that appellees have title only to that part of the land that was actually occupied by Mrs. Norvell, but the proof shows that Earle intended to give and did give her the whole tract; and her possession, being referable to the gift, extends to the limits of the boundaries of the land so given her. Wood on Limitation of Actions, § 260, p. 603; Angell on Limitations, § 405; Sedgwick & Wait on Trial of Title to Land, § 773.

2. Laura M. Norvell had title to the lands, and was in the possession of them by actual occupancy of her tenants at the time the proceedings to enforce the lien of the levee district for the collection of levee taxes were instituted. Neither Mrs. Norvell nor her tenant who occupied the land was made a party to the proceeding. Hence the sale thereunder as to Mrs. Norvell was void; and the purchaser at said sale acquired no rights against her or her heirs. *Van Etten v. Daugherty*, 83 Ark. 534.

Nor could the sale by the administrator of the estate of Louisa Earle under orders of the court affect her rights. She was not in any way interested in said estate. She was not required to take notice, and was not bound by any proceedings had in the course of administration.

3. It is next insisted that appellees are estopped from setting up the title claimed by them. It is claimed that the estoppel arises from the fact that Mrs. Norvell knew that the land was advertised for sale by the administrator of Mrs. Earle and by the commissioner under the levee tax decree. An estoppel *in pais* depends upon the facts in each particular case. Mrs. Norvell was not present at either the administrator's sale or the sale under foreclosure proceedings for the levee taxes. She was not a party to or interested in either proceeding, and is not estopped from claiming the land in controversy.

"All that equity requires is that a person shall do no act, nor be guilty of any misleading reticence, or apparent acquiescence, by which another may be entrapped into a transaction which he would not have entered upon if he had been advised of the objection. For instance, if one stands by when he should assert his claim, and by that induces a purchaser to believe he has none, he will be estopped. But a mere knowledge that a third person is about to purchase does not of itself impose upon the owner of an equity the duty of seeking him out, and advising him against

it." *Bramble v. Kingsbury*, 39 Ark. 131; *Simpson v. Biffle*, 63 Ark. 289; *Waits v. Moore*, 89 Ark. 19.

4. Neither counsel for appellant nor cross-appellant have abstracted the testimony upon which the master's report is based, and by the familiar rule of practice we are not required to explore the transcript for alleged errors.

The judgment will be affirmed.

DISTRICT GRAND LODGE NO. 11, ENDOWMENT OF THE GRAND
UNITED ORDER OF ODD FELLOWS v. PRATT.

Opinion delivered December 5, 1910.

1. INSURANCE—BENEFIT INSURANCE—DEFENSE.—Where the defense to a suit upon a benefit certificate was that the insured was in arrears to the benefit society, and therefore not entitled to sick benefits, such defense was not a technical one, and it was error to instruct the jury that "technical defenses to actions upon insurance policies are not regarded with favor by the courts." (Page 617.)
2. INSTRUCTIONS—WHEN ABSTRACT INSTRUCTIONS PREJUDICIAL.—Where abstract instructions are misleading, they will be held to be prejudicial, and will cause a reversal of the judgment. (Page 618.)

Appeal from Garland Circuit Court; *W. H. Evans*, Judge; reversed.

STATEMENT BY THE COURT.

Appellant was a benefit society organized under the laws of Arkansas. It issued to its members a benefit certificate which entitled the beneficiaries to the amount named therein within ninety days after proof of the death of the member in good standing. Appellee was a beneficiary under a policy issued to her sister, Victoria Pratt, who was a member of the society. The latter died August 8, 1908, and appellee brought this suit, alleging that her sister had complied with all the conditions of the policy, and that appellee was therefore entitled to recover the amount named therein (\$250), for which she prayed judgment and also for penalty and attorney's fees. The answer denied that Victoria Pratt had complied with the conditions of the policy, and denied liability. The policy required as a condition of recovery that the

member shall have "complied with all the rules and regulations" of the "Benefit Association," that he shall have been in "good standing at the time of his death," and shall have paid all fines, dues and assessments imposed by the order at the time same became due."

Members were "unfinancial" when they owed an amount in excess of \$1.50 "for fines, dues or any assessments." "When *unfinancial*, members were not entitled to sick benefits, and if such members died they were not entitled to anything. A member could not be reinstated while sick." A law of the society provided that "a member who is financial and taken sick cannot, while he remains sick, become non-financial," as it is the duty of the lodge to deduct his or her indebtedness from his or her sick benefits. The quarters were known as January, April, July and October. The regulations required the quarterly dues to "be paid promptly and regularly." The quarterly dues had to be "in the hands of the endowment secretary within thirty days after the beginning of the quarter." A general law of the society provided: "The secretary of every lodge is hereby required to notify every non-financial or forfeit member of his being non-financial or forfeit, with the amount of his or her indebtedness, adding to each notice a fine of twenty-five cents;" and "provided further that no fines, taxes or assessments shall be considered as being due and collectable until after the expiration of one calendar month from their imposition, and the secretary shall give to each member a notice of the imposition of such fine, special tax or assessments at least twenty days before the same shall become due."

On behalf of appellant there was testimony tending to prove that Victoria Pratt was "*unfinancial*" before she became sick on July 4, 1908; that she owed in dues, fine, assessment and penalty an amount equal to \$2.50; that notice was given her of the delinquency June 22, 1908.

On behalf of appellee there was testimony tending to prove that Victoria Pratt was in good standing with the lodge at the time of her death. At that time she was the treasurer of the society. She had not been suspended or excluded for misconduct or non-payment of dues, etc. A card signed by the secretary was held by each of the members showing when their dues,

etc., were paid. Victoria Pratt at the time she was taken sick held such a card showing that she was *financial*. There was a conflict in the evidence as to whether the card reflected the truth as to the standing of Victoria Pratt. The appellant contended, and its evidence tended to prove, that the indorsements on the card showing that Victoria Pratt had paid her dues, etc., were forgeries. The testimony on behalf of appellee tended to show to the contrary. The testimony on behalf of appellee also tended to prove that no notice was given Victoria Pratt of any delinquency.

The court at the request of appellee granted the following among other prayers:

"1. If payment of assessment had been frequently allowed to be made after due, and the officers of the local lodge had, by their course in conducting business, caused the deceased to believe that strict performance on her part would not be exacted, then a forfeiture could not be insisted upon because of the non-payment of the last assessment, and the plaintiff would be entitled to recover.

"2. The jury is instructed that technical defenses to actions upon insurance policies are not regarded with favor by the courts.

"3. When an insured has money due him from a lodge on account of sick benefits, he has a right to rely on the lodge to deduct from the amount to pay dues."

Exceptions were duly saved to the ruling of the court in granting the above prayers. A verdict was returned in favor of appellee for \$250. Judgment was entered against appellant for that sum, and it duly prosecutes this appeal.

Scipio A. Jones and W. R. Donham, for appellee.

1. The first instruction should not have been given because there was no evidence on which to base it. It was abstract. 63 Ark. 177; 76 Ark. 567; *Id.* 348; *Id.* 599; 77 Ark. 20; 65 Ark. 222.

2. However true it may be that "technical defenses in actions on insurance policies are not regarded with favor by the court," there was no occasion in this case for such a charge, and its giving was prejudicial.

3. The third instruction is misleading. There is no evidence that at the time the insured's arrearages became due she had any sick benefits due her from the lodge. Her failure to pay had already worked a forfeiture before she became sick. 86 Ia. 279; 53 N. W. 243; 140 Ill. 301; 29 N. E. 1121.

R. S. Bowers, for appellee.

WOOD, J., (after stating the facts). The only question in this case, under the evidence, was whether or not Victoria Pratt at the time she was taken sick, July 4, 1908, was in arrears to the society of which she was a member in excess of the sum of \$1.50. If she was due the society at that time a sum in excess of that amount, she was, according to the laws of the society, "unfinancial," and not entitled to sick benefits.

This being the question of fact for the jury to determine under the evidence, the court erred in giving the instructions we have set out in the statement and numbered 1, 2 and 3, respectively. These instructions were abstract, misleading, and, therefore, prejudicial. We find no evidence to warrant the court in submitting to the jury the question as to whether or not the appellant was estopped by the conduct of its officers from insisting on the forfeiture of the policy, or benefit certificate, for the nonpayment of dues by Victoria Pratt. If Victoria Pratt was unfinancial on account of the nonpayment of dues under the laws of appellant at the time she was taken sick, then there was nothing in the evidence to warrant a finding that appellant was estopped from insisting on such nonpayment as a defense to the present suit.

If Victoria Pratt was nonfinancial according to the laws of the appellant at the time she became ill (July 4, 1908), then such defense was not technical, but substantial. Where there was a sharp conflict in the evidence as to whether or not Victoria Pratt had complied with the laws of the society upon which was founded her right to its insurance benefits, it was error for the court to tell the jury that "technical defenses to actions on insurance policies are not regarded by the courts." This was calculated to cause the jury to believe that the defense set up by appellant here was technical, and that, although they might find it supported by the evidence, yet, inasmuch as it was *technical*, they need not look upon it with favor. The court

did not tell the jury what was meant by "*technical*" defenses, and, inasmuch as the defenses set up by appellant were not technical, the instruction was well calculated to mislead the jury and to prejudice appellant.

If Victoria Pratt was "unfinancial" at the time she became ill, then under the laws of the society she was not entitled to sick benefits. The question, as we have stated, for the jury to determine was whether Victoria Pratt was unfinancial before or at the time she was taken ill. If she was not *financial*, then she could not become so thereafter by an allowance of sick benefits. But instruction No. 3 was calculated to make the jury believe that sick benefits could be allowed a member although such member might be unfinancial when taken sick, and if the amount of such sick benefits at the time of the member's death was equal to the amount that was due from the member at the time he was taken sick, then such member should be declared in good standing and entitled to the amount called for in the benefit certificate.

Abstract instructions should not be given; and if they are misleading, they will be held prejudicial, and will cause a reversal of the judgment. *St. Louis, I. M. & S. Ry. Co. v. Denty*, 63 Ark. 177; *Davis v. Richardson*, 76 Ark. 348; *Frank v. Dungan*, 76 Ark. 599; *St. Louis I. M. & S. Ry. Co. v. Knight*, 77 Ark. 20; *Pratt v. Metzger*, 78 Ark. 177; *Harris Lumber Co. v. Morris*, 80 Ark. 260. See also *Kinslow v. State*, 85 Ark. 514; *Little Rock & M. Ry. Co. v. Russell*, 88 Ark. 172; *Chicago, R. I. & P. Ry. Co. v. Moon*, 88 Ark. 231; *Arkansas & La. Ry. Co. v. Sain*, 90 Ark. 278.

For the error in giving the instructions mentioned the judgment is reversed and the cause is remanded for new trial.

KIRBY, J., not participating.

MEIER v. SPEER.

Opinion delivered December 5, 1910.

1. CONSPIRACY—DEFINITION OF "BOYCOTT."—A "boycott" is a combination to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse by threats

that, unless those others do so, the combination will cause similar loss to them, or by the use of such means as will inflict bodily harm on them, or such intimidation as will put them in fear of bodily harm. (Page 624.)

2. SAME—AGREEMENT AS TO TERMS OF WORK.—In the absence of a contract, and where no public duty forbids, workmen may agree upon the terms on which they will work for others, and may refuse to work if such terms are not accepted. (Page 625.)
3. SAME—BOYCOTT.—An agreement between the members of a labor union not to work for a particular person nor to work on a particular building if he has any contract to do work thereon is not unlawful. (Page 625.)

Appeal from Sebastian Circuit Court, Fort Smith District;
Daniel Hon, Judge; reversed and dismissed.

STATEMENT BY THE COURT.

John Carbaugh, who lived in Fort Smith, Arkansas, was a contractor, and engaged in the building of houses. He also was engaged in the manufacture and sale of brick. The Fort Smith Biscuit Company had instructed its president to let a contract to Carbaugh for the building of its factory and two ovens. Carbaugh was unable to procure one O'Neal, a stone contractor, to lay the foundation of the building. O'Neal refused to take the contract to lay the foundation for the reason that the masons in his employ, among whom were appellants Meier and McCauley, would not do the work if Carbaugh was to erect the superstructure. If Carbaugh had succeeded in erecting this factory, he would have made a profit of about \$2,500. A contractor by the name of Zimmerman, who employed only union labor, had the contract for the construction of certain brick buildings for the Fort Smith Supply & Construction Company. He would have purchased the brick for these buildings from Carbaugh, but his foreman, Glenn, a member of the union, told him that the union brick layers would not work them, and he could not afford, therefore, to purchase them from Carbaugh. Had Carbaugh succeeded in selling the brick for these buildings to Zimmerman, he would have made a profit on them of at least \$500.

Appellant Meier was the president of the Stone Masons' Union No. 14, and appellant McCauley was its secretary. James Riddick was secretary of the Brick Layers' Union No. 8. A rule

of these unions required their members to work only for those who employed union labor and on jobs where only union labor was employed. A breach of this rule by a member subjected him to a fine or suspension; the one or the other was imposed, depending upon the gravity of the offense. No official boycott was declared by these unions against Carbaugh. It was attempted, but was "ruled out of order, and no attention paid to it at all."

To use the terminology of the unions, "fair" work means when the contractor, who is having the work done, employs only union mechanics, to the exclusion of all other mechanics, on the work. Carbaugh was considered by appellants as "unfair" because he employed nonunion laborers and refused to employ union labor only. For that reason appellants refused to work on buildings that he had the contract to build. When Meier, at the request of O'Neal, met with the president of the Biscuit Company and the architect for the purpose of telling them the reason why the stone masons would not put in the foundation, it was shown that, in explanation of the attitude of himself and the other members of the stone masons' union, Meier said: "Carbaugh is the man we are after." But the testimony further shows that he said, in the course of the same conversation, that "he mentioned Carbaugh because he was the only man in town that was employing nonunion workmen." The testimony, as a whole, shows conclusively that Meier had no personal illwill or animosity against Carbaugh. Nor did any of the other appellants. Their sole reason for refusing to lay the foundation for their employer, O'Neal, on a building the superstructure of which was to be erected by Carbaugh was that Carbaugh employed to do his work nonunion labor and would not employ union labor exclusively.

Carbaugh alleged in his complaint against appellants "that they and others with whom they are associated and the unions have wrongfully, maliciously and wilfully conspired together and connived with each other and with the unions to which they belong to cripple and destroy" his brick manufacturing business and his business as a builder and contractor. He alleged that, in pursuance of such conspiracy, appellants had boycotted the use of his brick, and had refused to use them in any building upon

which either they or their associates might be employed, and had refused to work upon any building or its foundation where plaintiff's brick were to be used or for the building and erection of which plaintiff had the contract. The complaint alleges that the loss to Carbaugh of the contract to build the factory for the Fort Smith Biscuit Company and the loss of the sale of the brick to the Fort Smith Supply and Construction Company, mentioned above, was a direct and proximate result of the unlawful conspiracy and boycott instituted by appellants to destroy Carbaugh's business. It concludes with a prayer for damages in the sum of \$3,000.

The answer denied all the material allegations. The above is a condensed statement of the pleadings and the facts upon which the cause was submitted to the jury. The appellants prayed for an instruction directing a verdict in their favor, which was refused. A verdict was returned in favor of Carbaugh in the sum of \$2,233. Judgment was rendered against appellants for that sum, and they have duly prosecuted an appeal to this court. Carbaugh has since died, and the action was revived in the name of his administrator, Speer. Other facts stated in opinion.

Mechem & Mechem, for appellants.

The court should have directed a verdict for the appellants. The evidence utterly fails to bring appellants under any legal liability to appellee. The manifest, declared and undeniable purpose of appellants, acting through their unions, as appears by the evidence, was to advance their own interests, which was lawful, and their acts were but the lawful exercise of personal rights to control their own labor. 26 Cyc. 819; 4 Metc. 111; 106 Mass. 14; 19 R. I. 255; 54 Minn. 223; 170 N. Y. 315; 136 N. C. 633; 49 S. E. 177; 24 Pa. 308; 169 Fed. 263; 98 Pac. 1027.

Winchester & Martin, for appellee.

The peremptory instruction was rightfully refused. The evidence clearly discloses a conspiracy on the part of appellants, acting through their unions, to inflict injury upon the appellee in his business. The individual acts may not in themselves be unlawful or hurtful and forbidden by law, but, when put together into a plan or conspiracy to injure, the parts as well as the plan becomes unlawful. 196 U. S. 395; 49 Law. Ed. 523; 195 U. S.

194; 49 Law. Ed. 154; 208 U. S. 496; 52 Law. Ed. 294; 175 U. S. 211; 44 Law. Ed. 136; 23 L. R. A. 588; 64 Mich. 252; 80 Tex. 400; 106 N. Y. 669; 176 Ill. 608; 43 L. R. A. 800; L. R. 15 Q. B. Div. 476; L. R. 6 Q. B. Div. 333; 98 Pac. 1027; 193 U. S. 38; 48 Law. Ed. 608; 48 L. R. A. 90, and authorities cited; 38 L. R. A. 197; 43 L. R. A. 803; 83 Fed. 912; 47 La. 214; 27 L. R. A. 416.

WOOD, J. (after stating the facts). The court should have directed a verdict in favor of appellants. We do not discover any evidence in the record of a conspiracy upon their part to injure the business of Carbaugh. No attempt was made by them, either individually or collectively, to dissuade O'Neal, for whom they were working, from entering into the contract with Carbaugh to lay the foundation of the Fort Smith Biscuit Company's factory. Nor does the evidence show any effort upon the part of these appellants to prevent Zimmerman from buying brick from Carbaugh. Certainly there is no evidence in this record that these appellants, severally or in combination, used any violence, or any threats, intimidation or coercion of any character, whereby to prevent Carbaugh from securing the contract to build the factory for the Fort Smith Biscuit Company, nor from securing the contract for the sale of brick to Zimmerman for the Fort Smith Supply & Construction Company. Giving the evidence its strongest probative force in favor of appellee, it only warrants the conclusion that appellants had agreed among themselves, as members of union labor organizations, that they would not work for Carbaugh because he was on what they term the "unfair list," that is he employed nonunion men when he could get union men for the same work.

There is no evidence that the union labor organizations took any official action towards "boycotting" Carbaugh because of his attitude towards union labor. On the contrary, the evidence is that such action was "attempted but ruled out of order." There is no evidence of any conspiracy or confederation among appellants to injure Carbaugh's business by boycotting him, *i. e.*, by threatening injury to the trade, business or occupation of those who might have or who intended to have business relations with him. True, O'Neal testified that but for the "interference of the stone masons' union and some of its members, Meier and McCauley, "he would have put in the foundation for John Car-

baugh," but he further testified to the facts which, in his mind, constituted the interference, which were that Meier and McCauley said, when he asked them about it, that they and the members of the stone masons' union would not work for him in laying the foundation of the biscuit company factory if Carbaugh should have the contract to build the superstructure. He testified that these men had been in his employ twelve or fifteen years, that he did not wish to change his men with the job, "that it would have put him in bad standing, and that he would have been in the same place Carbaugh is, had he done so. But the conclusion of the witness O'Neal as to what might have been his standing with union labor and what might have been the effect upon his business, had he accepted the contract and laid the foundation for Carbaugh with other than union labor, is not based upon any evidence in this record showing that appellants by any word or act on their part threatened him with any such consequences as he says he apprehended.

The language employed by them certainly contained no element of intimidation or coercion, and the evidence does not disclose that in the manner of its use appellants intended that it should have the effect to intimidate or coerce O'Neal into refusing to take the contract from Carbaugh. O'Neal's apprehensions, therefore, so far as the evidence shows, were groundless.

There is no evidence that appellants endeavored to coerce O'Neal in any way. They made no threats whatever against his business. They did not even say that they would abandon his employment in the future if he took the contract to lay the foundation for Carbaugh. All they did was simply to tell him, upon his own inquiry and at a meeting held at his instance, that they would not work for him in laying the stone foundation if Carbaugh got the contract to do the brick work on the superstructure.

There is no testimony that the conduct of appellants, either individually or in concert, caused Zimmerman to refuse to buy brick from Carbaugh to build the houses for the Fort Smith Supply & Construction Company.

The fact that Glenn, who was a member of the brick masons' union, told Zimmerman that the brick layers' union would not use Carbaugh's brick, and that Zimmerman would not buy the

brick of Carbaugh because of what Glenn said, does not connect appellants in any manner with that transaction. It is not shown that Glenn was authorized to speak for appellants, and they were therefore not responsible for what he said. After a careful analysis of the evidence, our opinion is that the only reasonable conclusion to be drawn from it is that appellants agreed among themselves that they would not do any work for Carbaugh because "he was on what they termed the unfair list, that is, he employed nonunion men when he could get union men" to do the same work, and because he refused to employ union men to the exclusion of all others; that the reason appellants had this understanding among themselves was because they were members of labor unions, one of the rules of which required its members, under a penalty, to work for only those who employed exclusively union labor; that appellants joined the union and adhered to the rule in the instant case primarily for the protection of their own interest, and not for the purpose of injuring Carbaugh, except as he might be injured incidentally by adherence to the rule which was made solely for the benefit and protection of the members of the union to which appellants belonged; that appellants had no ill will against Carbaugh, and refused to work for him or his intended subcontractor solely because of his (Carbaugh's) attitude toward union labor; that appellants in their refusal to work for Carbaugh, or one whom he might employ, used no intimidation or coercion of any character in order to dissuade others from working for or patronizing him.

The principles of law applicable to the above facts are few, simple and well established. Mr. Martin in his recent work on the Modern Law of Labor Unions, at page 103, § 67, gives a correct definition of boycott as follows: "A combination to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse by threats that, unless those others do so, the combination will cause similar loss to them, or by the use of such means as will inflict bodily harm on them, or such intimidation as will put them in fear of bodily harm." He further says, same page, § 69: "Intimidation and coercion are essential elements of a boycott. It must appear that the means used are threatening and intended

to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done." Citing many cases in note. While violence or the threats thereof frequently accompany a boycott, yet it is not essential that physical force, or the threat thereof, be present in order to constitute a boycott. But the things done or the words spoken must be "intended and naturally tend to overcome the will of others," and to induce them to do or not to do the things which those in the combination desire. Martin on the Modern Law of Labor Unions, p. 104, § 69, and cases cited.

As we have stated, there is nothing in the conduct of appellants toward O'Neal that would constitute a boycott by them against Carbaugh. It was not proved that they were under any contract with O'Neal for a definite time to do stone mason work for any whom he might designate. In the absence of a contract, appellants had the absolute right, no public duty forbidding, to prescribe the terms upon which they would work for Carbaugh, O'Neal or any one else. They had the right to refuse to work unless these terms were accepted and contractual relations were thereby created. This appellants had the right to do, severally or in combination, in the union or out of it. So long as appellants, either individually or collectively through their labor unions, directed their efforts solely to the control of their own labor and to formulating plans for bettering its condition, and to prescribing the terms upon which it might be had that would not interfere illegally with the rights of others, they were within the bounds of the law. For the right of every man in this country to dispose of his own labor as he chooses, so long as he does not contravene any duty to the public nor interfere with the legal rights of others, is both fundamental and axiomatic. What appellants could lawfully do acting singly, they could lawfully do conjointly, each and all having a like interest to conserve and promote. The Supreme Court of Massachusetts, speaking along this line, said:

"Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is not

a crime for any number of persons, with a lawful object in view, to associate themselves together and agree that they will not work for or deal with a certain man or classes of men, or work under a certain price, or with certain conditions." *Carew v. Rutherford*, 106 Mass. 1. And the Supreme Court of Rhode Island in *MacCauley v. Tierney*, 19 R. I. 255, says:

"It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose and to annex any condition to the bestowal which they saw fit." And further: "What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful." See also to the same effect the opinion of Chief Justice Parker speaking for the court in *National Protective Association v. Cumming*, 170 N. Y. 315, and of Judge Mitchell for the court in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Commonwealth v. Hunt*, 4 Met. 111.

Hence labor unions are held by the courts generally to be lawful. As is said in 24 Cyc. 819: "Legislatures as well as the courts now recognize the right of laboring people to organize for the purpose of promoting their common welfare, elevating their standard of skill, advancing and maintaining their wages, fixing the hours of labor, and the rate of wages, obtaining employment for their members, securing control of the work connected with their trade, or favorable terms to their employers in the purchase of material and contracts for such persons as employ the members of their society."

The efforts of labor unions by any lawful means to attain these legitimate and commendable objects will not make them or their members liable in damages to those who may be directly or indirectly injured by such efforts. For, the purpose and the means used to obtain it both being lawful, there could not be any conspiracy or boycott. And, if any injury resulted to any one, it would be merely incidental and *damnum absque injuria*. The conservation of the chief asset of the laboring man, namely, his labor, through combination with his fellows and by their organized efforts is to be commended rather than condemned. For in that way his well being may be best promoted and the interest of society thereby advanced. As observed by Judge

Taft in *Thomas v. Cincinnati, N. O. & T. Ry Co.*, 62 Fed. 803, p. 817: "It is of benefit to them and the public that laborers should unite. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered." As to how far the members of labor organization may go in their efforts to protect and promote their own interests without illegally interfering with the rights and interests of those who are not members of their unions is a question, of late years, under modern conditions of society and government, that has been frequently before the courts of last resort. The decisions of these courts disclose a wide divergence of opinion. We need not enter this realm of controversy to determine which is correct of the different views that have been expressed by courts and individual judges. Every case must rest upon its own facts, and we are of the opinion that, under the peculiar facts presented by this record, the conduct of appellants could not be held to be a conspiracy or a boycott to injure Carbaugh under any of the divergent views expressed by any of the courts or judges. Certain it is that the doctrine of the cases cited from which we have quoted *supra*, and other cases (all to be found in appellants' brief), shows most convincingly that the plaintiff Carbaugh had no cause of action against appellants. See especially *National Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. 263, and *J. F. Parkinson Co. v. Building Trades Council*, 98 Pac. 1027.

The judgment is therefore reversed, and the cause is dismissed.

KIRBY, J., not participating.

WILFONG v. STATE.

Opinion delivered December 5, 1910.

1. JURY—EXAMINATION—PRESUMPTION.—Where the record recites that certain jurors were duly selected, sworn and impaneled as members of the jury, it will be presumed on appeal that they were examined under oath as to whether they were qualified jurors. (Page 628.)

2. **APPEAL AND ERROR—HARMLESS ERROR.**—If it is competent to impeach a witness by proof that men were allowed to visit her house during all hours of the night, the exclusion of such testimony was not prejudicial where the witness herself testified substantially to the same effect. (Page 628.)

Appeal from Bradley Circuit Court; *Henry W. Wells*, Judge; affirmed.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

PER CURIAM: Appellant has not been represented here by counsel, and we have no brief on his behalf. We have, however, carefully examined the record, and find the appeal to be without merit or the appearance of merit. The indictment charges the crime of murder in the first degree, and appellant was convicted of murder in the second degree. The evidence was abundantly sufficient to sustain the verdict. In fact, a verdict for murder in the first degree would have been well sustained by the evidence.

The motion for new trial sets up as one ground that the court erred in allowing certain named jurors to be sworn and impaneled as members of the jury without first having each of them examined under oath as to whether they were qualified jurors. The record, however, recites that they were duly selected, sworn and impaneled as members of the jury, and, in the absence of any further affirmative showing in the record that they were not examined in accordance with the statute, it will be presumed that the court followed the statute in selecting and impaneling them.

Another assignment of error is that the court refused to permit appellant to prove by one of the witnesses that Willie Brown, a witness who had testified on behalf of the State, had for a long time before the killing been in the habit of permitting men to visit her home during all hours of the night. The killing occurred at the house of Willie Brown, and she was present when it occurred, and testified at the trial as to all the details. Her own testimony showed that she was a woman of loose character, and that her house was an immoral resort. If it was competent to prove by other witnesses that men were allowed to visit her house during all hours of the night, there was no

error in refusing to allow the particular witness named to testify in this regard, as the substance of that testimony was proved by Willie Brown herself; and if the effect of this would have been to have discredited the testimony of Willie Brown, that effect was obtained from the latter's own testimony. So, even if the excluded testimony was competent, its exclusion was not prejudicial.

The other assignments of the motion for new trial are not borne out by the record. The judgment is affirmed.

EASTER v. STATE.

Opinion delivered December 5, 1910.

1. CONSPIRACY—DECLARATION OF CONSPIRATOR.—The statement of a conspirator, made during the existence of the alleged conspiracy, and before its consummation, is competent where the State makes a *prima facie* showing of the conspiracy. (Page 631.)
2. SAME—DECLARATION OF CONSPIRATOR.—It is within the discretion of the trial court to permit the statement of an alleged conspirator to be introduced in a prosecution of a fellow conspirator before the evidence tending to prove the conspiracy was introduced. (Page 632.)
3. SAME—EVIDENCE—LETTER.—In a prosecution of an alleged conspirator for murder, it was competent for the State to introduce a letter written by one of the conspirators to which the name of the defendant was signed with his knowledge. (Page 632.)
4. SAME—EVIDENCE.—It was not error, in a trial for murder, to permit a witness to state that, after hearing the testimony of witnesses at the examining trial and within two days after the killing, he examined the scene of the killing and found tracks there, and that the shoes of one of defendant's alleged fellow conspirators fitted these tracks. (Page 632.)
5. HOMICIDE—INSTRUCTION—WHEN HARMLESS.—While it was error, in a murder case, where there was a conflict as to who did the killing, but the evidence established that it was done by lying in wait, to instruct, in the language of Kirby's Dig. § 1765, that, "the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused," the error was not prejudicial as assuming that the killing was done by the accused if no such construction was placed upon it by court or counsel, and the question as to who did the killing was otherwise properly submitted to the jury. (Page 633.)

Appeal from Nevada Circuit Court; *Jacob M. Carter*, Judge; affirmed.

McRae & Tompkins and *D. L. McRae*, for appellant.

1. It was error to permit the witness Sutton to detail the conversation and statement of John Easter in the absence of the defendant. The general rule does not apply in this case because a conspiracy was not proved—no testimony of a conspiracy to which defendant was a party except the statements of this witness, who, by his own testimony, was an accomplice, accessory and co-conspirator, 77 Ark. 444, 450; 3 Greenleaf. on Ev. (13 ed.) § 92; 92 Ark. 592; 59 Ark. 422; 37 Ark. 67; 55 Mich. 256; 12 Cyc. 442, 444; 8 Cyc. 684.

2. It was also error to permit the witness Sutton to detail the conversation with and statements by Wiley Easter in the absence of the defendant subsequent to the killing. 78 Ark. 284, 290; 45 Ark. 165-171; *Id.* 328; 67 Ark. 234.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

The testimony fully establishes a conspiracy, and the statements of appellants' co-conspirators, made in pursuance of said conspiracy, were properly admitted. To establish a conspiracy, it is not necessary to prove the unlawful agreement by direct and positive evidence. Neither is it necessary that other proof of the conspiracy should be shown before the declarations of an alleged co-conspirator are admissible. 77 Ark. 451; 32 Ark. 220; 59 Ark. 430; 8 Cyc. 677; 12 Cyc. 439; 2 Wigmore, Law of Ev., § 1079.

MCCULLOCH, C. J. Appellant was tried under an indictment charging him with the murder of one Matthew Babb, and was convicted of murder in the second degree, his punishment being fixed at fifteen years in the penitentiary. Deceased Babb was appellant's uncle, being the half-brother of Wylie Easter, appellant's father. The testimony tends to establish a conspiracy between appellant and his father, and John Easter, his brother, to kill Matthew Babb. There is also testimony tending to show that Lem Sutton, who was the principal witness relied on by the State, was also a party to the crime. The parties are all negroes, and lived within a few hundred yards of each other in Nevada County.

Babb was shot with buckshot and instantly killed about 7 o'clock in the evening of February 5, 1910. The killing occurred in front of his house, just outside of his gate. His wife, on hearing the shot, ran out of the house and found his dead body. Some of the neighbors came in shortly, and one of them blew a horn for a good while, which was a customary signal for the assembling of the neighbors on account of some unusual incident. None of the Easters went to the scene of the killing that night, though they lived within hearing of the horn.

The next day John and Clint Easter and Lem Sutton were arrested and placed in jail. Subsequently, Wylie Easter and one Simon Tate were arrested, but later released. Lem Sutton testified in substance that on the day of the killing the three Easters made a proposition to him to go in with them and kill Babb, but that he declined to join them in committing the crime. He stated that late in the evening he went over to appellant's house, and was sitting on the porch with John Easter when appellant came up and called to his wife for the gun and shells which were lying on the bed; that appellant's wife gave the latter the gun, and that he and John went off down towards Babb's, and told him (witness) to "keep his mouth," adding that if they went to the pen their father would be there to get them out. He stated further that he heard somebody halloo three times, and a short while afterwards he heard a shot fired. He testified that afterwards appellant and John Easter, while in jail, told him all about the killing and where they stood when they shot Babb.

It is not contended that the evidence is insufficient to sustain appellant's conviction, but that there are several errors of the court assigned in admitting evidence. The first one is that the court erred in permitting Lem Sutton to testify as to statements made to him by Wylie Easter in the absence of appellant. These statements were made on or about the day of the killing and before it occurred. There was sufficient evidence to establish a conspiracy between all three of the Easters to kill Babb, and the statements of either of the three during the progress of the conspiracy, and before the consummation of the conspiratorial act, are competent evidence against either. All that is necessary to render the evidence admissible is for the State to make a *prima facie* showing of the existence of such a con-

spiracy at the time the alleged statements were made. *Chapline v. State*, 77 Ark. 444.

Sutton was allowed to testify as to statements made by Wylie Easter before there was testimony as to a conspiracy. Later in his testimony, however, the evidence tending to establish the conspiracy was introduced, and there was no error, for it was a matter within the sound discretion of the court to control the order in which the testimony should be adduced.

The State introduced a letter purporting to have been signed by John and Clint Easter and Lem Sutton. This was objected to, and the ruling of the court in admitting the letter is assigned as error. The parties were all in jail at the time, Clint and John being confined in jail together. There was evidence tending to show that the letter was written by John Easter at the dictation of Sutton; but on the other hand there was evidence warranting the conclusion that appellant, Clint Easter, knew that the letter was being written and given to Sutton, and knew the contents thereof, therefore it was competent evidence against him.

The next objection is as to the admission of the testimony of one C. B. Moon, who stated that he was present at the examining trial and heard the statement of Lem Sutton as to what Clint and John Easter had said, about the details of the killing, where they stood, etc., and that he then went to the scene of the killing and found tracks there, and that John Easter's shoes fit the tracks. The witness did not undertake to relate in detail what Sutton had testified at the examining trial. He merely stated that he heard Sutton testify as to what appellant and John Easter had told him about the occurrence at the scene of the killing, and that he thereupon went and made the examination, and was allowed to testify as to the conditions that he found there. Appellant objected both to the statement of the witness as to what Lem Sutton had said, and also as to the statement of the witness relative to what he found at the scene of the killing. The latter objection was based on the alleged ground that it was too long after the killing occurred. Lem Sutton gave the same account in his testimony at this trial that he had given at the examining trial with reference to what appellant and John Easter, while together with him in jail, told concerning the details of the killing, and where they stood, etc. Witness Moon, as has already been shown, did not state the

substance of Sutton's testimony; but, even if he had done so, there was no prejudicial error, for Sutton testified to the same facts on the witness stand. It was competent to permit the witness to testify as to the conditions he found at the scene of the killing, after having heard the testimony of the witnesses at the examining trial. According to his testimony, this occurred on Monday after the killing had taken place Saturday night. The parties had been in jail since Sunday morning, and it was competent to show the conditions surrounding the scene of the killing and the fact that there were tracks there near the scene of the killing to which the shoe of John Easter, one of the alleged conspirators, fitted.

There are some other assignments of error in the admission of testimony, which we have considered and find not to be well founded.

Objection was made, and exceptions saved, to the instructions of the court given in the exact language of section 1765 of Kirby's Digest, which reads as follows: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." This instruction was given in connection with many others on the law of homicide, and in connection with instructions telling the jury that it devolved on the State to prove all the material allegations of the indictment beyond a reasonable doubt. It is contended that this instruction was not applicable in a case where there was a conflict as to whether or not the defendant did the killing. It is true that this statute is applicable only in cases where the killing is claimed to have been done in self-defense, and is not applicable in cases of killing by lying in wait. There is no prejudicial error, however, in giving it in any case, for no harm could result in giving it as an abstract proposition of law. The danger of giving it in the exact language of the statute is that it might be construed as an assumption by the court that the killing had been done by the accused. The instruction was not, however, objected to on that ground, and that construction seems not to have been placed upon it by court or counsel.

We do not think that under the facts of this case, where there was a sharp conflict as to who did the killing, and that question was submitted to the jury on correct instructions clearly defining the issue, there could possibly have resulted any prejudice from giving this instruction. The instruction was simply a misfit in this case, which could not possibly have had any bearing on the result.

On the whole case, we conclude that the defendant has received a fair trial, and that the evidence sustains his conviction. So the judgment is affirmed.

HALL v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.
Opinion delivered December 5, 1910.

1. MASTER AND SERVANT—NONPAYMENT OF WAGES—PENALTY.—Where a railway company agreed that its trainmen should not be discharged without cause, and that if a discharge should be found to be unjust the employee should be reinstated and paid one-half time for the time lost, a trainman who was wrongfully discharged would not be entitled, under Kirby's Digest, § 6649, to recover the statutory penalty for nonpayment of his wages from the date of his discharge, as the statute permits a recovery of penalty only for earned wages. (Page 636.)
2. SAME—PENALTY FOR NONPAYMENT OF WAGES—MISTAKE.—Where small items were, under an honest mistake of the employer, omitted from an employee's pay for certain months, and afterwards the employee, claiming that wages were due him for a subsequent month, made demand for his earned wages, without specifically calling attention to the omitted items, which were paid before judgment, he was not entitled to recover a penalty for nonpayment of such items. (Page 637.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; affirmed.

J. B. Moore, for appellant.

1. It was error not to adjudge in appellant's favor interest on the amount of the debt found by the jury to be due to appellant from May 30, 1908, to the date of the judgment. 32 Ark. 612-616; Kirby's Dig. § 5379; 36 Ark. 355-64; 46 Ark. 87-95; 43 Ark. 275-84; 89 Ark. 41-45.

2. The court also erred in failing to adjudge in appellant's favor the penalty or damages provided for by the statute. Kirby's Dig. § 6649; Acts 1905, p. 537; 2 Beach on Contracts (1897 ed.), 1714-17; 98 Mich. 43; 56 N. W. 1053; 61 N. Y. 362; 33 Mo. 215; 9 Ark. 394; 27 Ark. 61-65; 39 Ark. 280-7-8.

Thos. S. Buzbee, George B. Pugh and L. P. Biggs, for appellee.

1. In a suit for unliquidated damages the plaintiff is not entitled to recover interest as such; and if in such case he is entitled to recover it under the statute, it is a question for the jury, not for the court. 21 Ark. 349; 82 Ark. 117-127; 28 Ark. 188.

2. There was nothing on which to base a verdict for a penalty.

MCCULLOCH, C. J. This is an action instituted by the plaintiff, Clinton Hall, against the Chicago, Rock Island & Pacific Railway Company to recover the sum of \$79.65 alleged to be due him by the defendant as wages and for the statutory penalty at the rate of \$3.80 per day after his discharge. The plaintiff was employed by defendant for a time as freight conductor on its road, his service commencing on January 8, 1908. On May 2, 1908, he was relieved from service by an order of his superior, and was given written notice thereof, as follows: "You are hereby notified that you are held out of the service of the Chicago, Rock Island & Pacific Railway Company on account of cancellation of bond." He did no further work after that date, and on May 20, 1908, was upon his own request given a letter of discharge or clearance in the customary form, as follows:

"El Dorado, Ark., May 20, 1908.

"This is to certify that Clinton Hall has been employed in the capacity of conductor at El Dorado, Arkansas, on the Louisiana Division of the Chicago, Rock Island & Pacific Ry. Co. from January 9, 1908, to May 2, 1908. Dismissed account bond cancelled.

"M. J. Kennelly, Superintendent."

On the trial of the case before a jury in the circuit court, on appeal from a justice of the peace, a verdict was returned in plaintiff's favor for the sum of \$68.40, without any penalty. Judgment was rendered in his favor accordingly, and he ap-

pealed to this court. No appeal was taken by the defendant, and the sole question before us is whether or not there is any error in the record so far as concerns the plaintiff's right to recover the statutory penalty.

The plaintiff contended in his testimony at the trial, and also contends here, that he had not contracted to give a bond, and that his discharge was wrongful. The jury manifestly accepted his view of the matter, and returned a verdict in his favor for the amount of his stipulated wages, \$3.80, from the date of the first letter up to May 20, a period of 18 days.

Plaintiff also contended, and now contends, that the notice dated May 2, was not a discharge, and that he was entitled to have his wages go on until he was discharged by the letter of May 20. The written contract under which plaintiff was employed provided in substance that trainmen should not be suspended or dismissed from the company's service without cause: that before suspension or dismissal a full investigation of the case should be had, if desired, and that after investigation, in case the suspension or dismissal is found to be unjust, the employee should be reinstated and paid one-half time for the time lost.

Now, according to the plain language of the letter or notice of May 2, plaintiff was relieved from further service in the employ of the defendant. He did not thereafter render any service for the defendant, and did not earn any wages. It is unimportant, for the purposes of this case, to determine whether his discharge was rightful or wrongful, for in neither event is he entitled to recover the penalty for nonpayment of his wages after that date. If the discharge was wrongful, plaintiff may have been entitled to recover damages on account of the breach of the contract; but he earned no further wages, and it is only for the nonpayment of earned wages that the statute authorizes a discharged employee to recover a penalty. Kirby's Dig. § 6649.

Plaintiff's account sued on included the sum of \$4.33 for a day's run in February, and \$2.81 for a part of a day's run in April. Subsequent to the commencement of the suit, defendant paid these items, and it is now insisted that, inasmuch as those items are conceded to have been due and were unpaid within seven days after demand made following the discharge, plaintiff

is entitled to recover the penalty for the omission to pay these items within that time. The plaintiff was paid his wages for the months of February, March and April with the exception of these items, and he signed the payroll. He testified that after his discharge he was paid the earned wages due him, with the exception of those items, and that he demanded the full amount of balance now claimed. He does not, however, state that he called specific attention to these omitted items in the amount due him for February and March. There is evidence which justifies the conclusion that these items were omitted from plaintiff's pay by an error, made in good faith by some of defendant's employees, and that the items were not intentionally withheld. We do not mean to hold that the good faith of the employer in failing to pay wages to a discharged employee will exonerate him from the penalty for failure to pay wages justly due; but we do hold that, under the circumstances of this case, where small items were, under an honest mistake, omitted from the pay, and afterwards a demand was made for earned wages without specifically calling attention to the omitted items, the recovery of a penalty is not justified. Good faith on the part of the discharged employee demands, if he intends to claim a penalty for the nonpayment of the omitted items due, that he should specifically call the attention of his employer to the same and demand payment thereof. These items were paid before judgment, and it is only fair to assume that if a specific demand had been made by plaintiff at the time his other wages were paid, these items too would have been paid. The statute was enacted for the protection of wage-earners, and was not intended as a snare to entrap the unwary employer. *Wisconsin & Arkansas Lumber Co. v. Reaves*, 82 Ark., 377.

We are therefore of the opinion that the plaintiff was not entitled to recover a penalty, and the judgment is therefore affirmed.

ARKANSAS & LOUISIANA RAILWAY COMPANY v. GRAVES.

Opinion delivered December 5, 1910.

1. **RAILROADS—FAILURE TO SIGNAL AT CROSSING—LIABILITY.**—Where the negligence of defendant's trainmen in failing to give the statutory signals of the approach of a train to an established crossing was the cause of plaintiff's injuries, the defendant will be liable if plaintiff was not a trespasser nor guilty of contributory negligence. (Page 641.)
2. **SAME—INJURIES NOT AT CROSSING—LIABILITY.**—One who was injured by defendant's train while crossing its track at a place which had been openly and notoriously used by the public as a crossing for many years, though it had not been established as a public crossing, is not a trespasser, and the defendant owed him the duty to exercise ordinary care not to injure him while crossing the track. (Page 642.)
3. **SAME—FAILURE TO KEEP LOOKOUT.**—Evidence that defendant's trainmen failed to keep a lookout while backing an engine and cars across a place which for many years had been openly used as a crossing and approach to defendant's depot platform, and that plaintiff was injured in consequence thereof, was sufficient to support a finding that defendant was negligent. (Page 642.)
4. **SAME—TRAVELER APPROACHING TRACK—DUE CARE.**—Ordinarily it is negligence for one approaching a railroad track at a crossing to fail to look and listen for the approach of trains; and he is deemed to have discovered whatever could have been plainly seen by looking and whatever could have been heard by listening. (Page 643.)
5. **SAME—CONTRIBUTORY NEGLIGENCE—WHEN FOR JURY.**—Where there was evidence that the plaintiff, before he attempted to cross defendant's side track, "slowed up," and looked and listened for the train, that he heard the noise of the engine beyond the depot, but thought it was on the main track, that his view was obstructed, that he was near a public crossing, and that no signals of the train's approach had been given, it was a question for the jury whether he was negligent. (Page 643.)
6. **SAME—FAILURE TO SIGNAL AS CAUSE OF INJURY.**—Evidence that plaintiff was injured at a place other than a public crossing, but near thereto, so that he could have heard the statutory signals if they had been given and could have been warned if the trainmen had been keeping a lookout will sustain a finding that the failure to give such signals or to keep a lookout was the proximate cause of his injuries. (Page 643.)
7. **INSTRUCTIONS—EFFECT OF SPECIFIC OBJECTION.**—Where appellant's objection to a particular instruction was to a specific part of it, it cannot insist on appeal that another part of the instruction was erroneous. (Page 644.)
8. **RAILROADS—DUTY TO STOP, LOOK AND LISTEN.**—It was not error to refuse to instruct to the effect that it is the duty of one going upon

a railroad track to stop as well as to look and listen, as there is no necessity to stop where one can look and listen without doing so. (Page 645.)

Appeal from Howard Circuit Court; *James S. Steel*, Judge; affirmed.

W. E. Hemingway, E. B. Kinsworthy, W. V. Tompkins and *James H. Stevenson*, for appellant.

1. The statutory duty to give signals for the protection of persons at highway crossings does not apply to any except *public highways*, and if, in this case, there was a failure to give signals, it was not negligence. Kirby's Dig. § 6595; 3 Yeates (Pa.) 417, 421; 3 Ore. 97; 8 Pac. 907; 7 N. Y. Sup. Ct. 289, 312; 7 Pick, (Mass.) 162, 164; 3 Elliott, Railroads, 335, § 1158; 64 N. Y. 535; 189 Ill. 559; 62 Md. 479.

2. The use which the evidence shows was made of the place as a crossing did not make it a public or highway crossing, nor give appellant a right thereon. He was a trespasser, or at most a bare licensee to whom the company owed no affirmative duty of warning. 3 Elliott on Railroads, § 1154; 44 Pa. St. 375, 379; 103 Ind. 27; 97 Ky. 228; 42 Ill. App. 93; 49 Ill. App. 232; 189 Ill. 559, 564; 70 Ga. 240, 241.

3. Appellant's own contributory negligence bars recovery. It was his duty to stop and look and listen, and that duty was the more imperative since he knew that there was an engine in motion in the yards. Since he knew this, there was no necessity that he be given formal notice by bell and whistle, nor would the law require it. 2 White on Personal Injuries, § 966; 3 Elliott on Railroads, § 1155; 70 Ga. 207; 84 Ark. 270; 56 Ark. 457; *Id.* 271; 54 Ark. 431; 62 Ark. 245.

W. P. Feazel, for appellee.

1. If it be conceded that appellee was not on a public crossing where he was injured, appellant was nevertheless under the duty to give the statutory warning, because the train was approaching a public street crossing within a few feet of appellant. 125 S. W. (Ark.) 655. The word road or street does not mean a public highway only. 123 Ill. 570; 5 Am. St. Rep. 559; 98 Am. Dec. 347 and cases cited in note; 90 *Id.* 55, 67. Where a railroad company has long permitted the public to cross its tracks at a place not a highway, it is bound to use reasonable care towards persons so crossing and to give warning to them so as to protect

them from injury. 104 N. Y. 362; 58 Am. Rep. 512; 99 N. C. 298; 6 Am. St. Rep. 512; 45 O. St. 11; 4 Am. St. Rep. and cases cited in note 526; 112 Ind. 250; 109 N. C. 472; 26 Am. St. Rep. 581; 64 *Id.* 453; 33 Cyc. 924.

2. The question whether or not appellee was, under the facts and circumstances of this case, a trespasser, or was crossing at this point by the sufferance and permission, if not by the implied invitation, of appellant, was for the jury to determine from the evidence. 85 Ark. 331; 94 Fed. 323; 23 Am. & Eng. Enc. of L., 742; 86 Ark. 184; 77 Ark. 562. If he was not a trespasser, his injury by appellant's train would cast upon it the burden of proving that it was not negligent. 63 Ark. 639; 57 Ark. 136; 53 Ark. 203.

3. In attempting to cross appellant's track, all that the law required of appellee was to look and listen to ascertain if a train was approaching and to exercise such ordinary care and diligence as a man of ordinary care and prudence would have done under similar circumstances to avoid being injured.

McCulloch, C. J. Plaintiff J. F. Graves instituted this action against defendant railway company to recover compensation for injuries alleged to have been sustained by being knocked down by one of defendant's trains while he was crossing the tracks near the depot at Nashville, Ark. Negligence of the company's servants is alleged in failing to keep a lookout, and in failing to give signals by bell or whistle. Plaintiff was crossing a side track at the southwest corner of the depot platform, and was struck by a freight car against which an engine backed and set in motion while being coupled to the train. There was a space there of 18 feet between the platform and a seed house, and the plaintiff adduced evidence tending to show that for many years past people openly and habitually crossed there afoot and with teams without objection from the railway company. There is a street running north and south parallel with the side-track, and the evidence tends to show that at the point mentioned the space is used for a crossing from this street to the station platform and to the premises of the company. The space was used, according to some of the evidence, as a means of access to the premises of the company, and this was with the permission, of, or at least without objection from, the company.

Plaintiff testified that the crossing was open, and was use clear across the right-of-way, but all the other witnesses testified that the way was closed on the east side, so that there was no access from that side. The testimony is conflicting as to whether or not there was a crossing on the sidetrack at that place, but there was sufficient to warrant a finding as stated above.

According to the undisputed evidence, there was a public street crossing over defendant's tracks, both the side track and the main track, about 40 feet south of the place mentioned on the south side of the seed house just described. The main track is on the east side of the depot, and the side track is on the west side.

On this occasion a mixed passenger train came in from the south, and, after stopping for a while (Nashville being the northern terminus of the railroad), the engine and two cars were uncoupled from the train and pulled up to a switch north of the depot, and then backed down the side track for the purpose of coupling to two cars standing near the place where plaintiff was injured. Plaintiff was a mail and express carrier, and had come to the depot to meet the train to see about some express which had come for him, and was leaving the premises to go to another railroad depot nearby. In attempting to do so he started across the side track at the place mentioned, and was struck by one of the cars pushed by the backing engine. The corner of the car struck him just as he got across the track. He testified that before going on the side track he "slowed up," looked and listened for an approaching train, but neither saw nor heard one approaching, and proceeded to go across. He stated that he heard the noise of the engine running above the depot, but thought that it was still over on the main line. The depot platform was four or five feet high, and plaintiff testified that a lot of boxes of freight piled on and extending over the corner of the platform obstructed his view to some extent up the side track. The evidence tends to establish the fact that no signals were given, and no lookout was kept.

It is insisted that the evidence does not sustain the verdict in plaintiff's favor in that it fails to establish negligence on the part of defendant's servants, and that it does indisputably establish contributory negligence on the part of plaintiff. The contention, as to the charge of negligence against defendant in

failing to give signals, is that the statutory requirement as to giving signals applies only to legally established public road crossings, and that there is no evidence to show that the place where plaintiff received his injuries was such a crossing. The argument entirely ignores the fact that there was a public street crossing about 40 feet south of the place where plaintiff was struck by the train, that the engine and cars were approaching that crossing, and that the trainmen were then under legal obligation to give the signals for that crossing—that is to say, to keep the bell or whistle sounding until the crossing was reached or the train stopped. Therefore, the point which learned counsel argue with so much earnestness, that the statutory requirements do not apply except to legally established road crossings, is not reached in this case. If the trainmen were guilty of negligence in the particular named, which caused plaintiff's injury, and if plaintiff was not a trespasser, and was not guilty of contributory negligence, then defendant is liable for the damages. *St. Louis, I. M. & S. Ry. Co. v. Shaw*, 94 Ark. 15; *St. Louis, I. M. & S. Ry. Co. v. Hudson*, 86 Ark. 183.

The evidence tends to show that the place where the plaintiff was injured had for many years—in fact, since the railroad was first put into operation—been openly and notoriously used by the public as a crossing, and that it was used as one of the approaches to the depot platform. Those who used the crossing did so not only by the permission but upon the implied invitation of the company, and the latter's servants owed them the duty of exercising ordinary care to avoid injury. *Moody v. St. Louis, I. M. & S. Ry. Co.*, 89 Ark. 103; *Missouri & N. A. Rd. Co. v. Bratton*, 85 Ark. 326. The plaintiff on this occasion came to the depot on business with the company, and had the right to leave the premises by the route commonly used by the public under permission from the company. He was not a trespasser, and the servants of the company were under duty to exercise care not to injure him while he was crossing the track.

There was also evidence of negligence on the part of the trainmen in failing to keep a lookout while backing the engine and cars down the side track. *St. Louis, I. M. & S. Ry. Co. v. Sparks*, 81 Ark. 187.

There was sufficient evidence to justify a submission to the jury of the question whether plaintiff was guilty of contributory

negligence. We can not say, as a matter of law, that under the evidence adduced he was guilty of negligence. He testified that before he attempted to cross the track he "slowed up," looked and listened for the train; that he heard the noise of the engine running above the depot, but thought it was on the main track. His view up the side track was to some extent obstructed by boxes of freight piled on the platform and also by the two freight cars standing on the side track.

A railroad track being a place of danger, it is the duty of one about to cross a track to look and listen for the approach of trains, and it is held in law, except under special circumstances which excuse the omission, to be negligent for a traveller to fail to observe those precautions. It is generally a question for the determination of the trial jury whether or not, under a given state of facts, the degree of vigilance in looking and listening was sufficient to amount to ordinary prudence for one's safety. The traveller is, however, deemed to have discovered whatever could have been plainly seen by looking and whatever could have been heard by listening. *St. Louis, I. M. & S. Ry. Co. v. Johnson*, 74 Ark. 372; *St. Louis, I. M. & S. Ry. Co. v. Dillard*, 78 Ark. 520.

The evidence in this case justified a finding by the jury that plaintiff did look and listen with the vigilance of an ordinarily prudent person, and that, without any negligence in this respect on his part, he failed to discover the approach of the train. Plaintiff admitted that he heard the engine running above the depot, but it was for the jury to determine whether or not it was reasonable for him to have been misled in supposing that the engine was on the main track, where he had last seen it. He had a right to rely to some extent on the giving of signals, and the jury could take that into consideration in determining whether or not he was in the exercise of ordinary care in attempting to cross the track.

The jury was warranted in finding, too, that the failure to give signals was the proximate cause of the injury, for, notwithstanding the plaintiff knew that the engine was running above the depot, the giving of signals would have apprised him of its approach. If a lookout had been kept, plaintiff would have been discovered and warned when he attempted to cross. We conclude that the evidence was sufficient to sustain the verdict.

The court gave the following instruction, the giving of which is now assigned as error: "7. It was the duty of the plaintiff in attempting to cross the defendant's track to look and listen, to ascertain if the train was approaching, to the end that he might avoid a collision and to otherwise use ordinary care to prevent his being injured. So in this case, if you find from the evidence that, before plaintiff attempted to cross defendant's track, he did look and listen for the approach of the train and exercised such ordinary care and diligence as a man of ordinary prudence would do under similar circumstances, and if you further believe that by reason of the failure of the defendant to give the proper signals or by reason of plaintiff's view up the track being obstructed he failed to discover or hear the approach of the train without fault on his part and was struck by said train and injured while attempting to cross, you will find for the plaintiff."

The serious defect in this instruction is in telling the jury in the latter part thereof that if, "by reason of plaintiff's view up the track being obstructed, he failed to discover or hear the approach of the train," the defendant would be liable. We can not understand why this language was used, for in considering the other instructions given it is not thought that the court could have meant to say that the failure of plaintiff, on account of the obstructions, to see up the track would render the defendant liable. It is probable that in framing this instruction it was intended to use the conjunctive participle "and" instead of the disjunctive "or," so as to make the instruction state the law to be that if, by reason of negligence of the trainmen in failing to give signals, and by reason of the plaintiff's view being obstructed, he did not, though in the exercise of due care, discover the approach of the train, defendant would be liable. Learned counsel for defendant must have so construed the instruction at the time it was given, for they did not object to that part of it. They objected only to the first half of the instruction, on the ground, specifically stated in their objection, that plaintiff knew that the train was running and the trainmen were not bound to give signals to warn him. The objection to the other half of the instruction can not be made here for the first time. There was no general objection to the whole instruction.

Error is assigned in the refusal of the court to give the following instructions asked by defendant:

"3. You are told that the defendant and the public each have the right to use a public crossing; and that it is the duty of a railroad company to sound the whistle or ring the bell before it runs a train over a public crossing; but this duty applies only to persons lawfully using or about to use the public crossings. So, in this case, if you find that the plaintiff was struck by the train at a place not a public crossing, then the defendant owed him no duty to sound the whistle or ring the bell, and if it failed to do so it was not negligence."

"10. You are also told that the law requiring notice to be given of the approach of trains to public crossings is for the protection of persons using, or about to use, such crossings, and has no application to persons not using nor about to use them. So, in this case, if you believe from the evidence that the plaintiff was attempting to cross the track at a place other than the public crossing, then the failure of the defendant to sound the whistle or ring the bell, if it did so fail, was not negligence."

The weakness of defendant's contention, even if the statutory requirements for the giving of signals be held to apply only to legally established public crossings, is in assuming that because plaintiff was not at such a crossing defendant owed him no duty of protection. We have already shown the fallacy of this contention, for, if there was a duty to give signals on approaching a public crossing, and plaintiff, while at another place where he had a right to be, and in the exercise of care, was injured by reason of such omission to give signals, defendant was liable.

Error is also assigned in modifying, by striking out the italicized words, the following instruction requested by defendant:

"4. You are told that a railroad track is a perpetual reminder of danger, and it is negligence for one to go upon a track without looking and listening, *and, if necessary, stopping* to ascertain if a train is approaching. So in this case, if you find from the evidence that the plaintiff went upon the track without exercising these precautions and was injured, and that he would not have been injured if he had done so, your verdict should be for the defendant."

The question of the necessity for stopping to look or listen for a train has no place in this case. Plaintiff was walking when he attempted to cross the track and was injured. He says that he "slowed up" and looked and listened, and heard the engine,

but thought it was on the main track. Under the facts of this case, there could have been no necessity for stopping to look and listen, as plaintiff's senses of sight and hearing could as effectually have been exercised while walking along slowly as if he had stopped. Moreover, if the instruction had been given with the omitted words in it, the latter part would have been misleading in stating that if the plaintiff "went upon the track without exercising these precautions" he could not recover. The words "these precautions" might have been understood to mean to stop for the purpose of looking and listening, and imposed on plaintiff the duty of stopping, even though he would have availed nothing to have done so.

There are other exceptions to the giving and refusal of instructions, but the views we have already expressed as to the law and facts of the case fully dispose of all of the exceptions. We find no error. Judgment affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Winn *v.* Scraper; appeal from Washington Circuit Court; J. S. Maples, Judge; affirmed July 11, 1910; *per* Wood, J.

Knight *v.* Evers; appeal from Greene Chancery Court; Edward D. Robertson, Chancellor; affirmed October 31, 1910; *per* McCulloch, C. J.

St. Louis & S. F. Rd. Co. *v.* Russell; appeal from Lawrence Circuit Court; Charles Coffin, Judge; affirmed October 31, 1910; *per* Hart, J.

Raney *v.* Braman; appeal from Independence Chancery Court; George T. Humphries, Chancellor; affirmed November 28, 1910; *per* Hart, J.

Thomas *v.* Thomas; appeal from Hot Springs Chancery Court; Alphonzo Curl, Chancellor; affirmed November 28, 1910; *per* McCulloch, C. J.

Heffington *v.* Sturgis; appeal from Faulkner Chancery Court; Jeremiah G. Wallace, Chancellor; affirmed December 5, 1910; *per* Kirby, J.

Smith *v.* St. Louis & S. F. Rd. Co.; appeal from Clay Circuit Court; Frank Smith, Judge; affirmed December 5, 1910; *per* McCulloch, C. J.

II.

CASES DISPOSED OF ON MOTION.

John S. Braddock, Jr., *v.* Florence Irene Smith; Pulaski Circuit Court; F. Guy Fulk, Judge; appeal dismissed on appellant's motion, September 26, 1910; *per curiam*.

People's Life Insurance Company *v.* McRae & Ewton; Pulaski Circuit Court; C. T. Coleman, Special Judge; settled and appeal dismissed September 26, 1910; *per curiam*.

Ray Lismore *v.* The State of Arkansas; Ouachita Circuit Court; George W. Hays, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

Joe Wolf *v.* The State of Arkansas; Johnson Circuit Court; Hugh Basham, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

John Bach *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

W. P. Hammack *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

C. K. Goss *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

James Land *v.* The State of Arkansas; Cleveland Circuit Court; H. W. Wells, Judge; appeal dismissed on appellee's motion, October 3, 1910; *per curiam*.

R. C. Chism *v.* Tom Fletcher; Pulaski Circuit Court; Second Division; F. Guy Fulk, Judge; appeal dismissed on appellant's motion, October 3, 1910; *per curiam*.

C. B. King *et al. v.* W. Marvin Harris, Receiver of Capital City Savings Bank; Pulaski Circuit Court; Second Division; F. Guy Fulk, Judge; settled and appeal dismissed, October 3, 1910; *per curiam*.

Bradley Lumber Company *et al. v.* T. I. Pirtle *et al.*; Bradley Chancery Court; Zachariah T. Wood, Chancellor; judgment entered by consent of parties, October 10, 1910; *per curiam*.

T. W. Altman *et al. v.* J. S. Herring; Craighead Circuit Court; J. F. Gantrey, Special Judge; appeal dismissed under stipulations of parties, October 24, 1910; *per curiam*.

Tempo Whitcamp *v.* Hannah Whitcamp *et al.*; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; settled and appeal dismissed, November 14, 1910; *per curiam*.

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